No. 80-624

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHIRLEY M. HUFSTEDLER, SECRETARY OF THE DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL.

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QUESTION PRESENTED

Whether the Emergency School Aid Act of 1972, which permits the granting of waivers of ineligibility when a disqualifying "practice, policy, or procedure, or other activity * * * has ceased to exist or occur," precludes grants to school districts that have not yet eliminated the racial identifiability of their faculties, but have agreed to do so in the future.

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* Additional petitioners are Herman R. Goldberg, Acting Deputy Assistant Secretary for the Office of Educational Support, Department of Education, and Cynthia G. Brown, Assistant Secretary for Civil Rights, Department of Education. Secretary Hufstedler was substituted for former Secretary of Health, Education and Welfare Patricia R. Harris, and Ms. Brown was substituted for David S. Tatel, formerly Director of the Office for Civil Rights, Department of Health, Education and Welfare.

In addition to the Board of Education of the City School District of the City of New York, Frank Macchiarola, its chancellor, is a respondent.

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The Solicitor General, on behalf of the Secretary of the Department of Education and other federal parties, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 622 F.2d 599. The order of the court of appeals on denial of the petition for rehearing (App. C, *infra*) is reported at 622 F.2d 619. The opinion of the district court (App. E, *infra*) is reported at 464 F. Supp. 1114.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1979 (App. B, *infra*). A timely petition for rehearing was denied on May 19, 1980 (App. D, *infra*). On August 12, 1980, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

1. Section 706(d)(1) of the Emergency School Aid Act of 1972,[1] 20 U.S.C. 1605(d)(1), provides in relevant part:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> * * * * *
>
> (B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for

[1] In November 1978, Congress technically repealed and reenacted the Emergency School Aid Act of 1972 (ESAA), with amendments that

whom the agency has any administrative responsibility);

* * * * *

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause * * * (B) * * *, such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

2. The regulations of the Department of Health, Education, and Welfare[2] provide in pertinent part:

45 C.F.R. 185.44(d)(3):

In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by § 185.43(b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in § 185.11(a), conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assign-

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are not relevant here, by enacting the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143. The 1972 Act was also recodified at 20 U.S.C. 3191 *et seq.* Because this case was brought before the recodification, and the decisions below refer to the Act as previously codified, we also refer to the sections of the Act as they were codified prior to November 1978.

[2] All relevant administrative actions were taken by the Department of Health, Education, and Welfare prior to the organization of the Department of Education, to which responsibility for administration of

ments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole.

45 C.F.R. 185.11(a):

Plans pursuant to court or agency order. (1) A local educational agency may apply for assistance under this subpart if it is implementing a plan which has been undertaken pursuant to a final order issued by a court of the United States, or a court of any State, or any other State agency or official of competent jurisdiction, and which requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of such agency, or otherwise requires the elimination or reduction of minority group isolation in such schools. For purposes of this subparagraph, a State agency or official of competent jurisdiction means any State agency or official authorized pursuant to State law to issue such an order.

(2) A local educational agency may apply for assistance under this subpart if it is implementing a plan which has been approved by the Secretary as adequate under title VI of the Civil Rights Act of 1964 for the desegregation of minority group segregated children or faculty in the schools of such agency.

STATEMENT

In *Board of Education of the City School District of the City of New York* v. *Harris*, 444 U.S. 130 (1979), this Court considered the eligibility of the New York City Board of Education for a grant under the Emergency School Aid Act of 1972 for the 1977–1978 school year. The present case involves a like application for the 1978–1979

ESAA was transferred by Section 301(a)(2) of the Department of Education Organization Act, Pub. L. No. 96–88, 93 Stat. 677. Consequently, we will refer both to the Department of Education and to the Department of Health, Education, and Welfare.

school year. The significant difference, however, is that, while in *Harris* the question was whether the Board met the initial statutory eligibility requirements for ESAA grants, the issue here is whether the Board is entitled to a waiver that would permit it to receive ESAA funds notwithstanding its conceded initial ineligibility. See *Board of Education* v. *Harris*, *supra*, 444 U.S. at 133 n.2.

1. The Board applied for ESAA grants totalling approximately $2.36 million for the 1978–1979 school year. On June 20, 1978, the Secretary advised the Board that it was ineligible for those grants, under 20 U.S.C. 1605(d)(1)(B) and 45 C.F.R. 185.43(b)(2), because of discrimination in the hiring and assignment of teachers and administrators.[3] Thereafter, on July 7, 1978, the Board applied for a waiver of ineligibility. That was, however, a protective measure, pending the Board's appeal from a district court order upholding the Secretary's determination of ineligibility for the previous school year. See *Board of Education* v. *Harris*, *supra*, 444 U.S. at 137. The Secretary denied the Board's application on September 26, 1978, and the Board instituted this action on the following day.

Although the district court had upheld the Secretary's determination with respect to the Board's 1977–1978 application, the court declined to dismiss this action, which was based upon the same facts and legal theories. Instead, the district court took the unusual step of ordering the Board to amend its complaint to allege that it was entitled to a waiver of ineligibility under Section 706(d)(1), 20 U.S.C. 1605(d)(1), by virtue of a Memorandum of Understanding between HEW and the Board, concerning the lat-

[3] The Secretary determined that the school district was ineligible on two other grounds: (a) the existence of racially identifiable classes within schools, 20 U.S.C. 1605(d)(1)(C), 45 C.F.R. 185.43(d)(5); and (b) the imposition of disciplinary sanctions in a discriminatory manner, 20 U.S.C. 1605(d)(1)(D), 45 C.F.R. 185.43(d)(4). HEW subsequently withdrew its determination as to racially identifiable classes at the high school level, and the parties entered into a Letter of Agreement concerning disciplinary sanctions and racially identifiable classes at the elementary and junior high school levels.

ter's compliance with Title VI of the Civil Rights Act of 1964. In the Memorandum of Understanding, which was signed on September 7, 1977, the Board agreed to rectify the racial identifiability of its faculties over a three-year period, ending in September 1980.[4] The district court granted the Board's motion for a temporary restraining order on September 27, 1978, and a preliminary injunction was entered on October 10, 1978.[5]

The Secretary contended in the district court that the Board, merely by agreeing to take future action to rectify the racial identifiability of its faculties, did not thereby become entitled to a waiver because, under the statute, a waiver may be issued only if the "practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur" (20 U.S.C. 1605(d)(1)). The district court concluded, however, that the Secretary's interpretation of her statutory power to grant a waiver was "unduly limited" (App. E, *infra*, 45a). The court stated (App. E, *infra*, 66a):

> HEW may, but need not, grant a waiver where a plan like the New York 1977 Memorandum of Understanding has been adopted terminating all active discrimination and beginning prompt elimination of the results of past discrimination, but where the effects of past discriminatory teacher assignment [*sic*] have not been fully eliminated.

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[4] A group of teachers, principals, community school board officials, and parent-teachers association officials challenged the validity of the Memorandum of Understanding in *Caulfield* v. *Board of Education of the City of New York*, 449 F. Supp. 1203 (E.D.N.Y.), rev'd, 583 F.2d 605 (2d Cir. 1978). The district court set aside the agreement on March 15, 1978, and the Board thereafter discontinued its implementation. Implementation was resumed after the court of appeals reversed the judgment of the district court. On October 10, 1978, the district court vacated its prior order setting aside the agreement. The district court subsequently upheld the agreement following trial (complaint dismissed 486 F. Supp. 862 (E.D.N.Y. 1979)), and the Second Circuit affirmed, No. 79-6191 (Sept. 22, 1980).

[5] The court also set down the case for trial. The parties subsequently agreed, however, to submit the matter upon the pleadings, the administrative record, and certain stipulated facts.

On cross-motions for summary judgment, the court invalidated the applicable HEW regulation to the extent that the regulation conflicted with the court's construction of the statute.

2. The court of appeals affirmed by divided vote, construing the statutory language to mean that all that "must cease to exist or occur in order for an applicant to qualify for a waiver of ineligibility is its current acceptance of the status quo" (App. A, *infra*, 17a). The court reasoned that (*ibid.*):

> if the Central Board has adopted a policy of eliminating discrimination in a manner approved by HEW, as demonstrated by its commitment to the Memorandum of Understanding, then "practices," "procedures" and "other activities," undertaken in furtherance of that policy cannot logically be described as having resulted in the ineligibility. Simply put, they are not part of the problem, but part of the cure. The fact that the Central Board must tolerate segregative teacher assignments until the plan is fully implemented does not, under the language of the statute, preclude it from participation in ESAA.

The court of appeals found support for its holding in its understanding of the congressional purpose underlying the statute. The court rejected the Secretary's interpretation of the legislative history, noting that the statute contemplated the award of grants only to applicants that were implementing some plan for desegregation or the elimination of minority group isolation. The court reasoned that Congress must have intended that school districts which are initially ineligible for funding under the statute—because they have engaged in disqualifying discrimination since June 23, 1972—may qualify for a waiver despite their failure to eliminate the "effects" of discrimination. In the court's view, the existence of such a plan logically presupposes the continued existence of some effects of prior discrimination (App. A, *infra*, 22a–23a). Likewise, the court noted, an applicant which had eliminated the effects of discrimination would be unable to demonstrate its need for a grant under the competitive criteria of the statute

(App. A, *infra*, 22a). Finally, the court expressed concern with the inherently subjective nature of a determination whether the effects of past discrimination have been eliminated (App. A, *infra*, 21a).

Judge Oakes dissented, emphasizing that the majority had misread the Secretary's regulation, which he found to be rationally related to the objectives that Congress sought to achieve when it created the ESAA program (App. A, *infra*, 33a–36a). He also noted that the majority's discussion of the "effects" of past discrimination was wholly gratuitous in that the present "effects" of past discrimination were not disputed here (App. A, *infra*, 31a–32a). The issue presented, according to Judge Oakes, was whether the Board was entitled to a waiver simply because it had agreed to discontinue discriminatory assignments in the future, when the governing statute required that waivers be granted only when the "practice, policy, or procedure or other activity resulting in the ineligibility has ceased to exist or occur" and provisions have been made "to insure that such activities do not reoccur" (App. A, *infra*, 33a). In Judge Oakes' view, the Secretary had properly denied the Board's application.

By divided vote, the court of appeals denied the Secretary's petition for rehearing and suggestion for rehearing en banc. The court concluded that its decision was not inconsistent with this Court's holding in *Board of Education* v. *Harris*, *supra*, 444 U.S. at 151, that "discriminatory impact is the standard by which ineligibility under ESAA is to be measured." The court further stated (App. C, *infra*, 41a; emphasis in original) that its decision "did not distinguish between intentional and nonintentional discrimination, but rather, between the *maintenance* of either form of discrimination and a *policy of elimination of* either form of discrimination."

REASONS FOR GRANTING THE PETITION

In enacting the Emergency School Aid Act of 1972, Congress committed the federal government to a carefully

structured scheme of financial assistance that would encourage the elimination of segregation and minority group isolation in our nation's elementary and secondary schools. Since 1972, the ESAA program has proved to be one of the most effective means to that end. The importance of the program is amply demonstrated by the appropriation of approximately $270 million for 1980–1981 school year grants to school districts meeting the eligibility requirements set forth in the statute. In our view, the court of appeals has substantially blunted the instrument that Congress precisely fashioned to forward its goals in this vital area. Moreover, the decision below conflicts in principle with the decision of the District of Columbia Circuit in *Kelsey* v. *Weinberger*, 498 F.2d 701 (1974), and the Department of Education's administration of the program will be severely hampered unless this Court resolves that conflict.

1. For present purposes, it is undisputed that the New York City Board of Education does not satisfy the initial eligibility standards of the Emergency School Aid Act because, after mid-1972, it continued to "engage[ ] in discrimination based upon race * * * in the hiring, promotion, or assignment of employees * * *." 20 U.S.C. 1605(d)(1)(B). That obstacle is no different with respect to the 1978–1979 school year than it was for the previous year, at issue in *Board of Education* v. *Harris*, 444 U.S. 130 (1979). But, now as then, the hurdle can be overcome if the Board qualifies for a "waiver" under the statute. *Id.* at 133 n.2. The issue here is whether the Secretary rightly denied such a waiver on the ground that the Board had not yet eliminated a system of racially identifiable schools based on faculty assignments.

Congress has carefully prescribed the grounds and conditions upon which waivers of ineligibility may be granted. An applicant must first provide "such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur." 20 U.S.C. 1605(d)(1). Moreover, waivers may be granted only by the Secretary, whose authority

may not be delegated (20 U.S.C. 1605(d)(2)), and the Secretary may grant a waiver only "upon determination that any practice, policy, procedure or other activity resulting in ineligibility has ceased to exist, and that the applicant has given satisfactory assurance that the activities prohibited in [section 1605(d)(1)] will not reoccur" (20 U.S.C. 1605(d)(3)). The Secretary's determination must be made in writing, and he must notify the appropriate committees of the House and Senate before granting a waiver (20 U.S.C. 1605(d)(6)). When ineligibility is based on racial identifiability of the school district's faculties (20 U.S.C. 1605(d)(1)(B); 45 C.F.R. 185.43(b)(2)), the Secretary's regulations provide that the applicant must provide evidence that it "has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin" (45 C.F.R. 185.44(d)(3)).[6]

The question presented is straightforward: what must "cease[ ] to exist or occur" before the Secretary may issue a waiver of ineligibility. The court of appeals determined that all that "must cease to exist or occur in order for an applicant to qualify for a waiver of ineligibility is its current acceptance of the status quo" (App. A, *infra*, 17a). We submit that that holding is inconsistent with the overall scheme and purpose of the statute, the legislative history, and this Court's reasoning in *Board of Education* v. *Harris*, *supra*, all of which support the Secretary's view that actual assignments of faculty must be altered in a way that completely eliminates racial identifiability before a waiver may be granted.

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[6] The regulation further provides that:

> [such] nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in § 185.11(a), conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole.

a. Although the ESAA statute was not enacted until 1972, Congress first created a temporary program with similar purposes, which was enacted as part of an appropriation measure on August 18, 1970. That act, the Emergency School Assistance Program ("ESAP"), Pub. L. No. 91-380, 84 Stat. 800, 803-804, provided immediate financial assistance to desegregating school districts during the two years that Congress was debating various proposals for a more permanent and comprehensive program. HEW was charged with the administration of ESAP and promulgated implementing regulations. Among other things, HEW's initial regulations required that school districts provide assurances "[t]hat [they] will take effective action to ensure the assignment of staff members who work directly with children at a school so that the ratio of minority to nonminority group teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system" (45 C.F.R. 181.6 (a)(4)(vi)(1971)). The regulations relating to the 1971-1972 ESAP grant program likewise required an assurance "[t]hat the local educational agency has assigned its full-time classroom teachers for the 1971-72 academic year so that the ratio of minority to non-minority group classroom teachers in each school is substantially the same as the ratio that exists in the faculty of the system as a whole" (45 C.F.R. 181.6(a)(4)(vi) (1972)).

During the legislative process preceding the enactment of ESAA, Congress received substantial evidence of noncompliance by ESAP grant recipients with the nondiscrimination requirements established by the regulations.[7] In addition, the Staff Director of the United States

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[7] Both the General Accounting Office and a coalition of public interest groups issued detailed reports on the ESAP program. The coalition's report, *The Emergency School Assistance Program: An Evaluation* (Nov. 1970) stated (at 2-3):

> Large numbers of grants have gone to districts engaging in serious and widespread racial discrimination. Of the 295 ESAP-assisted districts which we visited, 179 were engaged in practices that rendered them ineligible for grants under the statute and

Commission on Civil Rights testified in Senate hearings, where he criticized the "meaninglessness of paper assurances" of compliance and emphasized the need for a pregrant mechanism for insuring that the applicant is not ineligible. *Emergency School Aid 1971: Hearings on S.195, S.683 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 431–432 (1971) (testimony of Howard A. Glickstein, Staff Director, United States Commission on Civil Rights).

In enacting ESAA, Congress therefore sought to include safeguards to assure that the deficiencies and abuses in the administration of ESAP would not reoccur. 117 Cong. Rec. 10758 (1971) (remarks of Senator Mondale). The most important of these safeguards was the addition of Section 1605(d), which established specific eligibility requirements and barred the Secretary from approving any application for assistance without first determining that the applicant was "not ineligible for reason of" its failure to meet those requirements. 20 U.S.C. 1605(d)(4). As part of the eligibility requirements contained in Section 1605(d), Congress specifically provided that the Secretary could not grant a waiver unless the factor causing ineligibility had ceased to exist or occur. Good intentions and bald assurances concerning future conduct were no longer to be deemed sufficient. Henceforth, applicants would be required to supply evidence that they had actually corrected the disqualifying condition.

The court of appeals noted that "to require that a waiver candidate have already remedied [the effects of past discrimination], which is the objective of the integration plan [it] is required to be presently effectuating, is contradic-

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the Regulations. In 87 others, we found sufficient evidence to consider the districts' eligibility questionable. In only 29—less than 10 percent—did we find no evidence of illegal practices. Specifically, we found:

* * * * *

—62 clear and 4 questionable cases in which faculties and staff had not been desegregated in accordance with applicable requirements [.]

tory and does not comport with the statutory scheme considered as a whole" (App. A, *infra*, 23a). If the purpose of the statute were to assist local officials in shouldering the costs of the physical process of desegregation, the court's observation would be well-taken. In fact, however, the ESAA grant program was established not to finance constitutionally required desegregation, but to assist local officials in meeting "the special needs incident to the elimination of minority group segregation and discrimination" (20 U.S.C. 1601(b)(1)). Grants are awarded not to subsidize the immediate costs of desegregation, but to assist local schools in maintaining sound educational programs in newly desegregated schools. Grants are authorized under the statute, therefore, for programs such as curriculum development, inservice teacher training, counseling, remedial services, bilingual education and educational television. See 20 U.S.C. 1606, 1607, 1610. In *Kelsey* v. *Weinberger*, *supra*, 498 F.2d at 711 (footnote omitted), the District of Columbia Circuit clearly stated the distinction overlooked by the courts below:

> [T]he Act makes moneys available, not for the basic desegregation activities themselves, but for auxiliary programs designed to enhance the success of the desegregation effort and ameliorate the inroads of past educational segregation. We find no provision in the Act licensing expenditures simply for the purpose of reassigning teachers * * *.

Under the Secretary's regulations, grant applicants compete with one another on the basis of "points," which measure the relative need of the applicants, as indicated by the number and percentage of their minority group enrollments, and the proposed projects' "effective net reduction in minority group isolation (in terms of the number and percentage of children affected)" (45 C.F.R. 185.14(a)(2)). Significantly, the key statutory concept of minority group isolation is defined in terms of student enrollments; the racial profile of faculty assignments is not relevant. See 20 U.S.C. 1619(10); 45 C.F.R. 185.02(g). Thus, a school district that had eliminated all racially identifiable school faculties would not be disadvantaged in the

ranking process; it would compete for a grant based upon the extent to which its plan proposed to reduce minority student isolation. Indeed, several component school districts within the decentralized New York City system received waivers and grants for the 1977-1978 school year, after they had eliminated the racial identifiability of their faculties. See *Board of Education* v. *Califano*, 584 F.2d 576, 585-586 n.32 (2d Cir. 1978), aff'd, 444 U.S. 130 (1979). That fact illustrates the faulty premises upon which the judgment of the court of appeals is based.

b. While the Secretary's interpretation of the waiver provision was not at issue in *Board of Education* v. *Harris*, *supra*, the Court's general analysis of the statute there supports the Secretary's interpretation. In *Harris*, the Court noted that Congress intended that the ESAA program should aid in the elimination of both *de jure* and *de facto* segregation, and therefore held that the existence of racially identifiable faculties should preclude assistance under the program, regardless of whether that condition resulted from purposeful discrimination. The Court stated that "it would make no sense to allow a grant to a school district that, although not violating the Constitution, was *maintaining* a *de facto* segregated system" (444 U.S. at 142; emphasis in original). Likewise, we submit that it would be exceedingly formalistic to declare that a school district is ineligible because it maintains *de facto* segregated faculties, but then to grant a waiver permitting the award of a grant during the continued maintenance of such segregation. If, as this Court has held, the existence of segregation is the dispositive factor under ESAA, the disqualifying discrimination cannot "cease to exist or occur" until the condition—racially identifiable faculty assignments—ceases to exist or occur. That New York may have adopted a policy of eliminating such assignments for the future is therefore immaterial because the "practice * * * resulting in the ineligibility" has not ceased to exist.[8]

[8]The insufficiency of promised future compliance is particularly obvious when ineligibility stems from racially identifiable faculty assignments. As the Ninth Circuit correctly observed in *Kelly* v. *Guinn*, 456

The legislative history of the 1978 ESAA reenactment, which the Court found relevant in *Board of Education* v. *Harris*, *supra*, 444 U.S. at 148–149, also supports the Secretary's construction. During the legislative process, Congress considered and rejected a proposal to amend the statute so as to overrule the Secretary's construction on this point. As this Court noted, "[t]he House version included a waiver-of-ineligibility provision to respond to complaints [related to HEW's] application of the regulation to Los Angeles and New York City" (*ibid.*). The House Committee report stated (H.R. Rep. No. 95–1137, 95th Cong., 2d Sess. 95–96 (1978)):

> In an attempt to deal with [the problem of denial of waivers for failure to fully integrate faculty], the Committee bill adopts an amendment making clear that school districts which are undertaking efforts to integrate their faculty but which have not yet fully achieved that goal may nonetheless obtain a waiver of ineligibility. Presently, the Department of Health, Education and Welfare is interpreting the law as requiring school districts to complete faculty integration before they can apply for funds. The purpose of this amendment is to assist those school districts while they are trying to achieve that goal.

The House provision was deleted by the Conference Committee (H.R. Conf. Rep. No. 95–1753, 95th Cong., 2d Sess. 286 (1978)), and the waiver provision remained unchanged, which "strongly suggests that Congress acquiesced in HEW's interpretation of the statute" (*Board of Education* v. *Harris*, *supra*, 444 U.S. at 149). What Congress declined to do, the court of appeals has done.

2. While we concede that the facts of this case are somewhat distinguishable[9] from those in *Kelsey* v. *Wein-*

F.2d 100, 107 (1972), "teacher assignment is * * * subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems * * * ." Moreover, the record here is devoid of any suggestion that teacher reassignments involve any financial expenditure.

[9]The court below distinguished the two cases on the ground that here HEW had, for purposes of Title VI of the Civil Rights Act of

berger, 498 F.2d 701 (D.C. Cir. 1974), the two decisions clearly present a "conflict in principle" on a narrow, but important, question of federal law that should be resolved by this Court. See *Ivan Allen Co.* v. *United States*, 422 U.S. 617, 623–624 (1975).

In *Kelsey*, parents of public school children in several cities challenged an amendment to the waiver regulation that the Secretary had promulgated in August 1973, applicable to 1973–1974 school year ESAA grants. Under the amendment, school districts that were ineligible for assistance because of racially identifiable faculties were given a maximum of two additional years (until the beginning of the 1975–1976 school year) to desegregate their faculties.[10] The Secretary's action was based upon his view that

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1964, accepted the school district's plan to eliminate racially identifiable faculties over a three-year period, ending September 1980, whereas the school districts in *Kelsey* planned "to remedy the practice only through a gradual and virtually open-ended process of attrition" (App. A, *infra*, 23a n.11). The court's distinction is not entirely sound, however, because the portion of the regulation that was invalidated in *Kelsey* required school districts to eliminate all racial identifiability of faculties not later than the beginning of the 1975–1976 school year, which actually provided those school districts with two years in which to eliminate racial identifiability, rather than the three years provided for in the Title VI plan here (see 45 C.F.R. 185.44(d) (3) (iv) (1973), quoted *infra*, note 10, page 15). While it is true that *Kelsey* did not involve a plan that HEW had formally accepted for purposes of Title VI compliance, there would appear, for present purposes, no practical or legal difference between such a plan and one accepted in exchange for a waiver under ESAA.

[10]Prior to the 1973 amendment, the regulation was virtually identical to that which currently exists. See 38 Fed. Reg. 3463 (Feb. 6, 1973). The third sentence of the regulation was amended to require, in the case of school districts not implementing a court ordered plan or a Title VI-approved plan (38 Fed. Reg. 21646–21647 (Aug. 10, 1973); 45 C.F.R. 185.44(d) (3) (1973)):

> (i) Adoption by such agency of a policy of nondiscriminatory assignment of faculty and staff members;
>
> (ii) Determination of all faculty and staff assignments made after the date of application for waiver in a manner which does not contribute to or reinforce the racial or ethnic identifiability of any school operated by such agency;

he could, consistent with the statute, grant "a longer period in which to complete corrective action" to school districts which "had demonstrated a commitment to the elimination of discrimination in faculty assignment," but had been "unable to alter the faculty assignment patterns within the existing time constraints." 38 Fed. Reg. 18899 (July 12, 1973).

The *Kelsey* court found possible constitutional questions raised by the Secretary's construction (498 F.2d at 709–710), and it held that waivers may not be granted until all racial identifiability of faculties has been eliminated. Although the court's constitutional fears may now appear insubstantial where ineligibility is based upon the effect of a school district's practice rather than its intent,[11] we submit that the *Kelsey* court's construction is nonetheless more consistent with the purpose of the ESAA program than is the construction adopted by the court below. At all events, the courts' differing views as to what the statute requires before a waiver can be granted has created uncertainty in the administration of the statute. If the Secretary receives a waiver application from a school district that agrees to alter its assignment policy for the future,

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(iii) Adoption of a plan to eliminate all fulltime teaching faculties composed exclusively of members of a single racial or ethnic group no later than the end of the period for which assistance is to be awarded; and

(iv) Adoption of a plan for assignment of faculty and staff members which will eliminate all racially or ethnically identifiable faculties at schools operated by such agency within a reasonable period of time but in no event later than the commencement of the 1975–76 academic year. * * *

[11]The court based its holding in part upon the premise that constitutional problems might result from the government's grant of ESAA funds to school districts that had not fully corrected the condition resulting in ineligibility. The court assumed that the school districts' ineligibility was necessarily based upon continuing constitutional violations (*id.* at 706 n.31), and that the federal government must not participate in such violations. The judgment in *Kelsey* was rendered prior to this Court's decision in *Board of Education* v. *Harris*, *supra*, in which the Court held that ineligibility under ESAA may be based upon something less than a constitutional violation.

but proposes to remedy past assignments on a phased basis, the Secretary will be placed in a position where her decision will violate either the holding in *Kelsey* or the decision below. The proper enforcement of the statute, which is essential to this nation's commitment to equal educational opportunity, requires this Court's resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1980

APPENDIX A

In the United States Court of Appeals for the Second Circuit

No. 79-6006

AUGUST TERM, 1978

No. 1079

(Argued June 5, 1979

Decided November 19, 1979)

Docket No. 79-6006

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND FRANK MACCHIAROLA, CHANCELLOR OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, PLAINTIFFS/APPELLEES,

v.

PATRICIA R. HARRIS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HERMAN R. GOLDBERG, ASSOCIATE COMMISSIONER, EQUAL EDUCATION OPPORTUNITY PROGRAMS, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND DAVID S. TATEL, OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS/APPELLANTS.

Before: OAKES and MESKILL, *Circuit Judges*, and STEWART, *District Judge.**

*Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appeal from an order entered in the United States District Court for the Eastern District of New York (Weinstein, District Judge) remanding for appellants' further administrative review appellees' application for a waiver of ineligibility under the Emergency School Appropriations Act, 20 U.S.C. § 1605(d)(1).

Affirmed.

RICHARD P. CARO, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney, Harvey M. Stone, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, Lois Hochhauser, Department of Health, Education and Welfare, Washington, D.C., of counsel), *for Defendants-Appellants.*

JOSEPH F. BRUNO, Office of the Corporation Counsel, New York, New York (Allen G. Schwartz, Corporation Counsel for the City of New York, Gregg M. Mashberg, Ellen B. Fishman, Office of the Corporation Counsel, New York, New York, of counsel), *for Plaintiffs-Appellees.*

MESKILL, *Circuit Judge:*

Three officials of the Department of Health, Education and Welfare (collectively "HEW," the "agency," or "appellant") including the Secretary[1] appeal from an order of

[1] At the time this case was argued, Joseph A. Califano, Jr. was the Secretary of the Department of Health, Education and Welfare. Prior to the filing of this opinion, however, he had been replaced by Patricia Harris, who has been substituted as an appellant herein pursuant to Rule 43(c)(1), Fed. R. App. P.

the United States District Court for the Eastern District of New York remanding for further administrative review the application of the Board of Education of the City School District of the City of New York (the "Central Board") for a waiver of ineligibility under the Emergency School Aid Act, 20 U.S.C. §§ 1601, *et seq.*,[2] and enjoining the appellant from expending funds originally designated for appellees' benefit pending such reconsideration. Previously, the Central Board had been denied funding under the program on the ground that the Central Board's assignment of black teachers to predominently black high schools disqualified it from receiving such benefits, *see* 20 U.S.C. § 1605(d)(1)(B). An application for a waiver of ineligibility was summarily denied on the ground that the agency lacked discretion to grant such relief in situations where although the segregative assignment policy had been repudiated, its "effects" still lingered. In reviewing the agency's action, the district judge found that HEW had been entirely too modest in its view of its prerogatives under the waiver provisions of the Act and ordered the matter remanded for administrative reconsideration of the merits of the Central Board's application. *Board of Education of the City School District of the City of New York* v. *Califano*, 464 F.Supp. 1114 (E.D.N.Y. 1979) ("Califano II"). We affirm.

I.

BACKGROUND

The instant appeal poses a very circumscribed issue. In substance, we are called upon to decide whether HEW's

[2]The version of the Emergency School Aid Act ("ESAA") governing this case was repealed, effective September 30, 1979, through passage of the Education Amendments Act of 1978, Pub. L. 95-561, Title VI, 92 Stat. 2252, *et. seq.* ESAA has been substantially re-enacted thereunder, with some modifications not relevant to the matters presented on this appeal, and has been codified at 20 U.S.C. §§3191-3207. Section 1605(d) of the old act, which is at issue herein, corresponds to newly adopted section 3196(c).

summary rejection of the Central Board's waiver application on the ground that the "effects" of the now-repudiated discriminatory practice had not yet been entirely abated was proper under the program's statutes and regulations. Before formulating a response, it is necessary to place this appeal in its proper setting which, owing to the volume of litigation which has preceeded it, is panoramic.

a. *The ESAA Waiver Provision and Its Implementing Regulation.*

Recognizing that the cost of desegregating public school systems or of maintaining adequate educational standards in those schools which had achieved integration was beyond the means of many local boards, Congress in 1972, after considerable debate, passed Title VII of the Education Amendments of 1972, the Emergency School Aid Act ("ESAA"), Pub. L. 92-318, Title VII, §§ 701-820, 86 Stat. 354 (1972), 20 U.S.C. §§ 1601, *et seq.* The announced purposes of the legislation are "(1) to meet the special needs incident to the elimination of minority group segregation . . . (2) to encourage voluntary elimination . . . of minority group isolation . . . and (3) to aid school children in overcoming the educational disadvantages of minority group isolation." 20 U.S.C. § 1601(b). This Court has previously characterized ESAA as "a program purposefully designed to 'aid in desegregating schools and support quality integrated schools.' " *Board of Education of the City School District of the City of New York* v. *Califano*, 584 F.2d 576, 578 (2d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3554 (U.S. Feb. 21, 1979) ("Califano I").[3]

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[3]*See also, Board of Education of the City School District of the City of New York* v. *Califano*, 584 F.2d 576, 578 n.3 (2d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3554 (U.S. Feb. 21, 1979) ("Califano I"), *quoting* Conf. Rep. No. 798, 92d Cong., 2d Sess. (1972): "The House amendment stated the purpose of the title as providing financial assistance to meet the special needs incident to desegration [*sic*] and to encourage voluntary integration. . . . The conference substitute retains the House provision. . . ." *And see*, H. Rep. No. 92-576 at 4, 92d Cong., 1st Sess. (1971) ("Most school districts, however, are pressed to meet ordinary expenses. They are in no position to incur the added expense

Funding under ESAA is available on a competitive basis. Applicants must submit timely proposals which are reviewed and ranked by the Assistant Secretary in accordance with the criteria set forth in agency regulations, 45 C.F.R. § 185.14, the most important of which is "the effective net reduction in minority group isolation." *Id.* § 185.14(a)(2)(i). *See also Califano I, supra*, 584 F.2d at 579 n.4. A local board whose proposal is deemed meritorious must be in the active process of desegregation, whether by mandatory court order, HEW-approved plan or voluntarily adopted procedure, 20 U.S.C. § 1605(a), and in addition, must demonstrate that subsequent to the date of ESAA's passage, June 23, 1972, it has not engaged in any of the acts, practices, policies or procedures proscribed under 20 U.S.C. § 1605(d)(1). Specifically included as a category of disqualifying conduct is discrimination in the "hiring, promotion, or assignment of employees . . ." *Id.* § 1605(d)(1)(B). *See generally Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This statutory prohibition is amplified in the regulation promulgated thereunder, 45 C.F.R. § 185.43(b)(2), which provides in pertinent part:

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination . . . including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.

Even though an applicant has been disqualified from the program by virtue of the commission of proscribed activity

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of achieving successful integration."); 118 Cong. Rec. 18438-9, 92d Cong., 2d Sess. (1972) (remarks of Sen. Pell). To similar effect were the remarks of Senator Javits, describing the mission of the bill as providing federal funding to offset the "added costs of special programs and staff required for effective desegregation and for meaningful efforts to reduce, eliminate or prevent the isolation of minority group children" and "to bring about better quality education," 116 Cong. Rec. 44410, 91st Cong., 2d Sess. (1970).

postdating June 23, 1972, it may nonetheless receive ESAA funds if it can obtain a waiver of ineligibility under 20 U.S.C. § 1605(d)(1). That provision requires the applicant to specify the reason for its exclusion from the program, and set forth such assurances as the Secretary may require to demonstrate that the disqualifying "practice, policy, procedure or other activity . . . has ceased to exist or occur," and that such activities will not reoccur after submission of the application. Although the legislative history is scant, Section 1605(d)(1) appears to have been adopted as a safeguard against the channeling of ESAA funds to any school district whose desegregation plan was a sham or was in danger of being abandoned or flouted. *See Califano II*, *supra*, 464 F.Supp. at 1121 and legislative history cited therein. In aid of this purpose the statute further provides that the Secretary may not delegate the duty of determining the adequacy of waiver applications, 20 U.S.C. § 1605(d)(2), that such applications must conform to the regulations promulgated thereunder, 20 U.S.C. § 1605(d)(5), that relevant committees in both houses of Congress shall be notified of the Secretary's favorable review of such applications, and that final approvals thereof will not formally be granted until 15 days after Congress receives this notification, 20 U.S.C. § 1605(d)(6).

With regard to the waiver of ineligibility stemming from discrimination in teacher assignments, the regulations provide, 45 C.F.R. § 185.44(d)(3):

> applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin.

b. *The Central Board's Attempts to Obtain ESAA Funding.*

In November, 1976, HEW's Office of Civil Rights notified the Central Board that its employment practices were in violation of laws barring discrimination in federally funded programs, 42 U.S.C. § 2000d and 20 U.S.C.

§ 1681, in that the agency's statistical data indicated that a pattern existed whereby teachers of minority group backgrounds were consistently assigned to schools whose student populations were predominently of similar racial or ethnic origin.[4] When the Central Board applied for a 1977–78 ESAA grant, HEW, although finding one proposal worthy of funding, denied the appropriation since its figures demonstrated that some schools were identifiable on the basis of segregative teacher assignments. The Central Board attributed the pattern to (1) provisions of the collective bargaining agreement between the Central Board and the teachers' union restricting the inter-school transfer of some teachers; (2) the preference of senior teachers for assignment to nonminority schools, together with their unwillingness to teach elsewhere; and (3) the unequal distribution of teaching licenses in specific areas. In the ensuing litigation, this Court held that ESAA funds could be properly withheld upon a simple showing that the assignment method had a disparate impact upon different groups, despite the absence of proof that the discriminatory deployment was willful or intentional—which would be required to support a finding that the Central Board's teacher assignment practices violated the Constitution. *Califano I*, *supra*.

On September 7, 1977, the Central Board and HEW entered into a detailed plan, entitled the "Memorandum of

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[4]Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title IX of the Education Amendments of 1972 similarly prohibits discrimination in federally assisted programs on the basis of sex. 20 U.S.C. § 1681.

Only the racially discriminatory system of teacher assignments is currently before this Court. As to this violation, HEW's November, 1976, letter stated that "The New York City school system . . . has, on the basis of race and national origin . . . assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools. . . ."

Understanding," *see Caulfield* v. *Board of Education of the City of New York*, 449 F.Supp. 1203, 1227 (E.D.N.Y.) ("Caulfield I"), *rev'd*, 583 F.2d 605, 607 n.2 (2d Cir. 1978), aimed *inter alia* at rectifying the objectionable mode of teacher assignments. Pursuant to this agreement, the Central Board undertook to phase out the practice over a three year period, in exchange for which, HEW's Office of Civil Rights warranted that the Central Board would be in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–86.

Implementation of the plan was hampered from the outset by individual teachers and principals and their unions. It appears that while teacher and principal assignments are, as a technical matter, made on an annual basis, certain collective bargaining agreements guarantee personnel with some degree of seniority placement in the schools where they have previously served. Claiming that the Memorandum of Understanding mandated the assignment of teachers to particular schools solely on the basis of race, several teachers and principals commenced legal action. On March 15, 1978, the district court, while not reaching plaintiffs' substantive claim, nonetheless found an abuse of plaintiffs' procedural due process rights to participate in the negotiations which had led up to the drafting of the desegregation plan, and vacated the Memorandum of Understanding, thereby halting its implementation, *Caulfield I*, *supra*. Approximately six weeks thereafter, the Central Board informed HEW that it would, for the present, be unable to fulfill its objective of correcting the prior pattern of discriminatory teacher assignments. For this reason, the Central Board's request for ESAA funding for 1978–79 was denied on June 20, 1978. An application for a waiver of ineligibility, which has become the subject of this appeal, was filed on July 7, 1978.

On September 5, 1978, this Court reversed *Caulfield I*, *supra*, reinstating the Memorandum of Understanding, and permitting the Central Board to renew immediately

its corrective measures.[5] Despite the revival of the desegregation plan, HEW on September 26, 1978, informed the Central Board that its waiver application had been denied for the reason that the agency lacked evidence that the prior mode of teacher assignment had ceased and would not reoccur.

c. *The Proceedings Below.*

Claiming that the summary rejection of its waiver application was an abuse of discretion, and seeking to enjoin the expenditure of $2.36 million in ESAA grants earmarked for it for the 1978–79 school year, the Central Board once again sought the intervention of the district court. A temporary restraining order, issued on September 27, 1978, was converted into a preliminary injunction on October 10 of that year. An expedited trial on the merits was scheduled for November 8 but both parties declined the opportunity to present oral testimony, preferring to submit the matter upon the pleadings, the administrative record and certain stipulated facts.

HEW took the stance that although no further impediment to the full implementation of the Memorandum of Understanding existed, it had properly denied the waiver application because both the statute, 20 U.S.C. § 1605(d)(1), and its implementing regulation, 45 C.F.R. § 185.44(d)(3), require that the waiver applicant alleviate both the cause and the remaining "effects" of prior discriminatory teacher assignments in order to qualify for ESAA funds. The district court upheld the agency's determination that the Central Board was ineligible for direct ESAA funding by virtue of discriminatory behavior postdating June 23, 1972. However, the court rejected HEW's contention that its option to grant a waiver was foreclosed because, in the agency's view, the waiver statute and relevant regulation require not only that the ap-

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[5]Other claims advanced by the *Caulfield* plaintiffs were recently rejected by the district court in *Caulfield* v. *New York City Board of Education*, 77-C-2155 (E.D.N.Y. August 27, 1979) (Weinstein, *J.*)

plicant have desisted from the proscribed activity, but also, in the case of segregative teacher assignments, that the applicant have fully eliminated the effects of the prior misconduct. After a canvass of the legislative history and a close analysis of congressional purpose, Judge Weinstein found that such was not the intent of the waiver statute. While he agreed that the regulation demanded that the waiver applicant cure both the cause and effect of past actions, he found the provision invalid as contrary to the legislation's objectives. Accordingly, he remanded the waiver application to the agency for reassessment on its merits, clearly indicating that evidence of the Central Board's backsliding, bad faith, or simple failure to implement the teacher assignment reforms on schedule could be considered as bearing upon the likelihood that the discriminatory practice might reoccur, and explicitly leaving the ultimate resolution of the application to the sound discretion of the Secretary. *Califano II*, *supra*, 464 F.Supp. at 1127. This appeal followed.

II.

JURISDICTION AND THE PROPRIETY OF ITS EXERCISE

a. *Waiver of Objection and Primary Agency Jurisdiction.*

As a preliminary matter, we must determine whether the district court properly entertained this action. Appellants claim that by failing to advocate the position while the matter was still under administrative study, the Central Board "waived" its right to challenge, under the theory ultimately adopted by the court below, HEW's denial of their waiver application.

It is true that as a general rule subject only to certain narrowly drawn exceptions, courts will not review objections to an agency's procedures not raised at the administrative level, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *NLRB* v. *Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974); *KFC National*

Management Corp. v. *NLRB*, 497 F.2d 298, 300 n.1 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976). However, the theory that the implementation of the Memorandum of Understanding absolved the Central Board of its current discriminatory teacher assignments could not have been raised prior to September 5, 1978, the date on which this Court resurrected the plan, by which time the waiver of ineligibility application had already been pending before HEW for two months. Moreover, there is some evidence to suggest that the agency did in fact weigh the prospect of the Memorandum's revival before finally denying the application. In its letter of September 28, 1978, formally notifying the Central Board of its action, HEW indicated that its unfavorable action might in some degree be attributed to its belief that the desegregation plan, even if implemented, was insufficient compliance with the nondiscrimination requirements of the ESAA program. Thus, it seems that the theory was not in fact "waived" in any meaningful sense.

Apart from the factual infirmities of the contention, the notion of "waiver of objection" is inappropriate to the circumstances of this case. That concept is applicable where a petitioner before an agency belatedly seeks to challenge a procedure employed by the administrative tribunal, *see, e.g.*, *KFC National Management Corp.* v. *NLRB*, *supra*; *NLRB* v. *Newton-New Haven Co.*, *supra* (Court of Appeals refuses to allow unsuccessful petitioner to challenge, for the first time, the composition of the agency's reviewing panel). What is involved here, however, is not an objection to the manner in which the agency has proceeded, or a claim which has been unjustifiably withheld from its review, but a question of the interpretation of the statute which regulates the appellees' access to the administrative review process itself. The essential issue is not one of waiver of objection or deliberate by-pass of a claim or theory before the agency tribunal. The essential issue is whether the courts or HEW should be given the first opportunity to construe the statute. Thus the controversy actually centers on whether, under the doctrine of primary

agency jurisdiction, the district court should have stayed its hand in deference to HEW.[6]

Primary agency jurisdiction is a flexible concept, concerned with "promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties," *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976), *quoting United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63 (1956). It is called into play when a court, having unquestioned jurisdiction over a case involving matters governed by an administrative agency, determines which tribunal should make the initial adjudication, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963) (Court's jurisdiction not ousted, but only postponed). The exercise of the court's discretion is guided in this situation by a desire for uniformity of regulation and the need for initial consideration by a body possessing special expertise in the issue presented. *U.S. Tour Operators Ass'n* v. *Trans World Airlines, Inc.*, 556 F.2d 126, 130 (2d Cir. 1977); *Danna* v. *Air France*, 463 F.2d 407, 412 (2d Cir. 1972).

Although we do not in any sense disparage this salutary doctrine, its underlying policies would not be served by its application in the instant case. Both parties, perceiving the issue presented as a purely legal one, abjured the district judge's invitation to present oral testimony and submitted the matter upon a stipulated set of facts and upon their respective briefs. It is well established that the courts need not defer to an agency where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact findings prowess. *FTC* v. *Feldman*, 532 F.2d 1092, 1096 (7th Cir. 1976); *cf. McKart* v. *United States*, 395 U.S. 185, 198 (1969).

Moreover, it has been recognized that where resort to the agency would plainly be unavailing in light of its manifest opposition or because it has already evinced its "spe-

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[6] For the same reason, the related notion of exhaustion of administrative remedies is not appropriate to these circumstances. *See Touche Ross & Co.* v. *SEC*, slip op. 2561, 2567-74 (2d Cir. May 10, 1979); *cf. McKart* v. *United States*, 395 U.S. 185, 193 (1969).

cial competence" in a manner hostile to petitioner, courts need not bow to the primary jurisdiction of the administrative body. *See, e.g., ICC* v. *Maine Central R. Co.*, 505 F.2d 590, 594 (2d Cir. 1974); *CAB* v. *Aeromatic Travel Corp.*, 489 F.2d 251, 254 (2d Cir. 1974); *see also Porter County Chapter of the Izaak Walton League of America, Inc.* v. *Costle*, 571 F.2d 359, 363–64 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3222 (U.S. Oct. 2, 1978). Such is the case here, for at no time prior to appeal has HEW given the slightest inkling that, if asked to review the waiver application in light of the reinstatement of the Memorandum of Understanding, it would consider the matter afresh. On the contrary, without itself having raised the issue of "waiver of objection" below, HEW fully briefed and hotly contested the issue on appeal. Elsewhere in the brief it submitted to this Court HEW has challenged the propriety of the district court's issuance of injunctive relief on the ground that there was no likelihood that the Central Board would persuade HEW to alter its determination to deny the waiver of ineligibility. It ill behooves appellant under these circumstances and at this stage of the proceedings to claim that the court below erred in adjudicating the merits of the case.

b. *"Effects" and Estoppel.*

Having determined that the district court properly exercised jurisdiction over this matter, we are nevertheless reluctant to adjudicate on the merits the contested questions of statutory interpretation. Our apprehension stems from an uneasy sense that the principal issue framed by the facts of this case has been artfully avoided. This issue is whether HEW, having induced and acquiesced in the Memorandum of Understanding, may now assert that its effectuation constitutes insufficient compliance with federal non-discrimination requirements to permit the Central Board to participate in the ESAA program.

HEW urges that 20 U.S.C. § 1605(d)(1) requires convincing proof that a waiver applicant has alleviated the

"effects" of its prior conduct. Yet nowhere in its briefs or argument has HEW defined the term "effects." Upon examination the term appears to refer simply to the continued discriminatory deployment of teachers, specifically contemplated by the Memorandum of Understanding as a temporary but necessary stage in the gradual phase-out of improper methods of teacher assignment. Thus, when all is said and done, HEW's view is quite simply that notwithstanding its approval of the Memorandum of Understanding, its warranty that the adoption and effectuation of the agreement would constitute compliance with Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, and the Central Board's partial performance thereof, the Central Board is not entitled to a waiver of ineligibility during the interim period.

While the estoppel issue looms shadowlike over these proceedings, we choose to rest our decision upon other grounds for several reasons. First, although the historic barriers to the imposition of an estoppel against the United States, *see United States* v. *San Francisco*, 310 U.S. 16, 32 (1940), *quoting Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–27 (1940), have recently been breached in at least one jurisdiction, *see, e.g., United States* v. *Lazy FC Franch*, 481 F.2d 985 (9th Cir. 1973); *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir. 1970), the law in this Circuit is unsettled, *compare Corniel-Rodriguez* v. *INS*, 532 F.2d 301, 306–7 (2d Cir. 1976) (government estopped in deportation proceeding due to its employee's noncompliance with affirmatively required duty) *with Goldberg* v. *Weinberger*, 546 F.2d 477, 480–81 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977) (estoppel will not lie against government due to unauthorized misrepresentation made by agency employee). *See also REA Express, Inc.* v. *United States*, 568 F.2d 940, 948–49 n.10 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 20, 1978) ("highly dubious" that government agency can be equitably estopped). Second, the parties have not addressed this issue, and on the basis of the record before us we are unable to determine with cer-

tainty that the requisite elements of an estoppel have been satisfied.[7] Lastly, we are in accord with the result reached by the court below. Therefore, rather than striking out on this inviting though uncharted course, we proceed to the merits of the case as articulated by the parties.

III.

INTERPRETATION OF THE ESAA WAIVER PROVISION

Putting these reservations to one side and proceeding on the assumption that appellant may complain of the Central Board's system of teacher assignments during the three year phase-in period, or alternatively, that there continue to exist unspecified, detrimental "effects" of the prior practice, we must next consider the validity of HEW's contention that such failings disqualify the Central Board from obtaining a waiver of ineligibility under 20 U.S.C. § 1605(d)(1).

a. *Statutory Text.*

"[T]he starting point in every case involving construction of a statute is the language itself." *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978), *quoting Blue Chips Stamps* v. *Manor Drug Stores*, 421 U.S.

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[7] An estoppel in this circumstance would require a misrepresentation by an agent of the federal government made within the scope of his authority, which was justifiably relied upon by the appellee to its detriment thereby making the denial of equitable relief unconscionable, *see generally New York Athletic Supply Co., Inc.* v. *United States*, 450 F. Supp. 469, 471 (S.D.N.Y. 1978); *Tonkonogy* v. *United States*, 417 F. Supp. 78, 79 (S.D.N.Y. 1976).

We cannot say with complete certainty that the expressed *quid pro quo* for implementing the agreement was the Central Board's immediate acceptance into the ESAA program, although such was the apparent expectation. Moreover, we would not eagerly hold that the Central Board suffered a detriment by reforming a practice which, although not necessarily unconstitutional, was sufficiently improper as to disqualify it from federal assistance under the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

723, 756 (1975) (Powell, *J.*, concurring). Section 1605(d)(1) in pertinent part provides:

> in the case of any local educational agency which is ineligible for assistance by reason of [the commission of certain discriminatory acts], such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

Appellant interprets this language to require that a waiver applicant not only demonstrate that it has desisted from its discriminatory activity, but also show that it has fully eradicated the vestiges of its past misconduct. HEW reasons that if the effects are still present, the cause must be extant, and if the cause is still operative, the applicant is perforce in violation of the statute's ban on current segregative activity.

However, the statute clearly states that what must cease to exist or occur is the practice, policy, procedure or other activity which has resulted in the applicant's ineligibility. There is simply no indication in the text that the residue of past misconduct must also be eliminated, although Congress could certainly have made that an express condition, had such been its intent. "[W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917); *see also Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 173 n.18 (1978); *New York State Commission on Cable Television* v. *FCC*, 571 F.2d 95, 100 (2d Cir.), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978) (Friendly, *J.*, dissenting) ("we have not quite reached the Humpty Dumpty era where a word 'means just what I choose it to mean, neither more nor less.'")

Moreover, the listing of the operative words, "policy," "practice," "procedure" and "other activity," may provide some insight into Congress' intent. While the latter three are ambiguous the term "policy" connotes conscious, institutional decision-making, or adoption of a future goal and the intention to achieve it through deliberate steps. It is opposed to mere drift or acquiescence in the present state of affairs. This meaning reflects upon the other terms, for words grouped together derive meaning from one another, *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). What must cease to exist or occur in order for an applicant to qualify for a waiver of ineligibility is its current acceptance of the status quo. It would seem therefore, that if the Central Board has adopted a policy of eliminating discrimination in a manner approved by HEW, as demonstrated by its commitment to the Memorandum of Understanding, then "practices," "procedures" and "other activities," undertaken in furtherance of that policy cannot logically be described as having resulted in the ineligibility. Simply put, they are not part of the problem, but part of the cure. The fact that the Central Board must tolerate segregative teacher assignments until the plan is fully implemented does not, under the language of the statute, preclude it from participation in ESAA. There is nothing in the statute's language which supports a contrary reading. Where the literal meaning of the statute is clear in its context, and where such a plain reading is not inconsistent with the scheme's objectives, that interpretation must prevail, and further inquiry may be unnecessary. *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *In re Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), *quoting CIR* v. *Brown*, 380 U.S. 563, 571 (1965); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976). Although this alone would be sufficient ground on which to reject appellant's construction there are other reasons supporting the same result.

b. *Legislative History.*

Two other courts have reviewed the legislative history of 20 U.S.C. § 1605(d)(1), and their research has yielded

no clues as to Congress' views on the question now before us, *see Kelsey* v. *Weinberger*, 498 F.2d 701, 707, 708 (D.C. Cir. 1974); *Califano II*, *supra*, 464 F. Supp. at 1121–22. From what is available, it can be deduced only that Congress wished to ensure that ESAA grants not be distributed to school districts which had reverted to or continued to engage in proscribed segregative activity, and that this resolve was embodied in section 1605(d)'s explicit requirements that waiver candidates (1) demonstrably have ceased their disqualifying activity, (2) provide acceptable assurances that such conduct will not reoccur, and (3) have their applications reviewed at the highest administrative level and, if acted upon favorably, subjected to congressional oversight. We have scanned the legislative history[8] relevant to the waiver statute and have found nothing to indicate that its drafters intended to establish additional safeguards such as the remedy of the effects of past malfeasance.

To support its contrary interpretation, HEW cites certain circumstances surrounding ESAA's enactment. In particular, it is noted that the operation of a forerunner program to ESAA[9] was marred by its distribution of funds to school districts later found to have been engaging in discriminatory practices. Noting that Congress' ire had been aroused by this failing, *see*, *e.g.*, 117 Cong. Rec. 10759, 92nd Cong., 1st Sess. (1971) (remarks of Sen. Mondale), appellant argues that ESAA's drafters intended to place an additional burden on those who, in disregard of the law, discriminated after the date of ESAA's enactment. HEW asserts that Congress meant for these defiant applicants to be banned from the program unless they did

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[8]*See* 117 Cong. Rec. 511–12, 92d Cong., 1st Sess. (1971) (remarks of Rep. Bell); Hearings on H.R. 17846 before the General Subcommittee on Education of the House Committee on Education and Labor, p. 570, 91st Cong., 2d Sess. (1970); Hearings on S. 3883 before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, pp. 94–97, 91st Cong., 2d Sess. (1970).

[9]The Emergency School Assistance Program, Pub. L. 91–380, 84 Stat. 800 (1970).

an additional penance, namely, the eradication of the effects of their recent misconduct.

This scenario seems improbable, for several reasons. First, it is unsubstantiated by the legislative history. The passages cited by appellant simply do not evince an intent on the part of the Congress to be especially punitive towards post-enactment discriminators. While the statements alluded to by HEW convey Congress' concern over the wrongful appropriation of funds to school districts which had either resumed discriminatory activities or which had never departed from them, they do not indicate that in order to solve the problem, Congress meant to bar from waiver eligibility those applicants who had not eradicated the effects of this recent malfeasance. Rather, the approach seems to have been to add the administrative and congressional safeguards noted above.

Second, we agree with the court below that HEW's interpretation is belied by the prominence it gives to June 23, 1972—the date of the Act's passage—in determining the widely different requirements which candidates must satisfy in order to obtain ESAA funds. Under appellant's construction, this date serves as a River Acheron, separating those who by virtue of post-1972 discrimination are almost certainly condemned to perpetual rejection, and those who may enjoy ESAA's benefits because they cease their disqualifying conduct prior to that fateful day. Yet for all the significance HEW attaches to the precise time of the Act's passage, that date was in reality entirely fortuitous. Had Congress truly intended to warn school districts that segregative practices beyond a certain date would result in virtually incurable ineligibility for ESAA benefits, they would have set that date for some time in the future, giving school boards time in which to reform themselves. As Judge Weinstein aptly noted:

> No one could have predicted that date as a cut off of the power to grant a waiver. Had the date been fixed some years prospectively, the argument might make some sense since Congress might have set it as a warning that corrective action must be taken before that date or funds under ESAA would be forever

> barred. But no school board could have responded to the Act by shutting off discriminatory acts on less than 24 hours notice; institutions cannot be turned on and off by the flick of a switch.

Califano II, *supra*, 464 F. Supp. at 1121.

c. *Legislative Objectives.*

Indisputably, today's choice between conflicting statutory interpretations will have broad consequences for the administration of an important federal program. Mindful that our function is to construe, not rewrite legislation, *United Steelworkers of America* v. *Weber*, 47 U.S.L.W. 4851, 4859 (U.S. June 27, 1979) (Rehnquist, *J.*, dissenting), we seek to discover Congress' intent and to decide which of the two proferred interpretations is most likely to further the announced objectives of the legislation. We conclude that the Central Board's understanding will more probably fulfill the goals of ESAA.

Congress clearly intended that school districts which had discriminated after June 23, 1972, not be irrevocably barred from participation in the ESAA program. Otherwise, the list of eligible applicants, as a practical matter, would have been forever frozen on the date of ESAA's enactment. School districts which had truly ceased segregative activity that had been practiced subsequent to the program's passage would have been permanently denied federal funding despite their good intentions and despite their potential benefit. Indeed, thus interpreted, the program would fail to provide any incentive to integrate in the case of school districts found to have been engaged in proscribed segregative activity after 1972.

Additionally, the drafters might have recognized that the concept of discrimination itself is constantly undergoing revision. If such was their perception, it has been validated. Some parties considered by a lower court to be discriminators have later been exonerated by the Supreme Court. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976). Con-

versely, some who might have been considered within the law as it stood on the date of ESAA's passage have now been deemed violators. *Cf. Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896 (U.S. June 28, 1978). The evolving contours of the concept of discrimination plainly warranted the adoption in the ESAA program of a provision giving its administrators the flexibility to deal with these developments.

Were we to read into the statute the requirement that a waiver applicant eradicate the "effects" of prior segregation, we would render that necessary section, in operation, a nullity. First, the notion of "effects" is simply too elusive and subjective; in a real sense, a complete cure may not be possible, for the consequences of past segregation may be viewed by the agency as lingering for a generation, or longer. *Cf. Debra P.* v. *Turlington*, 78-892-Civ-T-C (M.D. Fla. July 12, 1979) (functional literacy test, made prerequisite to granting of high school diploma enjoined for four year period since many black students had attended segregated schools and were therefore disadvantaged). No school district, however genuine its reforming zeal, could be certain that it had satisfied that condition, and the Secretary might find such a determination far more difficult than predicting whether an applicant was apt to revert to prior prohibited practices or policies. Second, HEW's interpretation does not indicate whether the effects which must be eradicated are only those which flow from the proscribed post-1972 activity, or all effects from whatever cause. If appellants opt for the former, such an interpretation would kindle irresolvable debate over which effect to attribute to which activity; if the latter, it may place at a severe disadvantage those school districts with a long history of *de jure* segregation, contrary to ESAA's insistence on a single national standard for the distribution of these federal funds. 20 U.S.C. § 1602.[10]

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[10] Section 1602(b) of 20 U.S.C. provides:

> It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education

More importantly, an applicant who could satisfy that burden would thereby dramatically demonstrate its lack of need for an ESAA grant under the program's own competitive criteria. As previously noted, in judging which of the numerous proposals are the most meritorious, the key factor, to put it succinctly, is desegregation per dollar: the rating system puts a premium on those plans which will achieve the most "effective net reduction in minority group isolation," 45 C.F.R. § 185.14. An applicant which has ceased its active segregation *and* has alleviated the effects of its prior misconduct could not, under these guidelines, hope to be awarded an ESAA grant, since the net effective reduction would be zero.

Realistically, HEW's contention would abolish the waiver provision from the program. An applicant ineligible for participation by virtue of discriminatory activity antecedent to 1972 could only obtain ESAA funding through a waiver of ineligibility; such a waiver would be granted only if the applicant had already been so successful in ameliorating minority group isolation that it could no longer competitively qualify for ESAA benefits. We would not attribute such an absurd intention to the drafters of ESAA. *See Bird* v. *United States*, 187 U.S. 118, 224 (1902); *Platt* v. *Union Pacific R.R. Co.*, 99 U.S. 48, 58 (1878); *United States* v. *Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968).

Finally, we think that HEW's understanding of the requirements of the waiver statute is in conflict with other significant features of the legislation, specifically the qualification that local boards seeking ESAA funding be currently undergoing desegregation pursuant to either a mandatory or voluntary plan. 20 U.S.C. § 1605(a)(1). The existence of such a plan, which is a condition of eligibility for waiver applicants as well as others, surely implies that

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Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

the effects of prior discrimination or minority group isolation still persist. Thus, to require that a waiver candidate have already remedied these effects, which is the objective of the integration plan is required to be presently effectuating, is contradictory and does not comport with the statutory scheme considered as a whole. *United States* v. *Menasche*, 348 U.S. 528, 538–39 (1955); *McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938).

Thus, the language of the statute, its legislative history, and its internal logic lead us to conclude that section 1605(d)(1) does not demand, as a prerequisite, that a waiver applicant have previously eradicated the effects of prior discrimination.[11]

IV.

THE IMPLEMENTING REGULATION

Alternatively, appellants argue that wholly apart from the dictates of the statute, the pertinent regulation promulgated thereunder, 45 C.F.R. § 185.44(d)(3), sets forth a legal duty on the part of waiver applicants to rectify the effects of prior discrmination in teacher assignments.

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[11] The result reached today is not necessarily incompatible with the holding in *Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974). There, the predecessor regulation to the current 45 C.F.R. § 185.44(d)(3) was held to be invalid insofar as it permitted a waiver to be granted to school districts which had suffered from racially motivated teacher assignments, and which warranted to remedy the practice only through a gradual and virtually open-ended process of attrition. Fearing that this offended constitutional prohibitions against the federal funding of discriminatory activities, the Court deemed the regulation to be contrary to the statute.

In our view, the requirement in the present regulation that the waiver candidate be proceeding in accordance with an HEW-approved plan which will achieve its goal in a reasonable period of time is sufficient to allay the concerns, both statutory and constitutional, expressed by the court in *Kelsey*, *supra*. To the extent that the cases are not distinguishable on their facts, we are in substantial agreement with the position taken by Judge Weinstein in declining to adopt the constitutional analysis of the District of Columbia Circuit Court. *Califano II*, *supra*, 464 F. Supp. at 1125–26.

HEW contends that the regulation is "legislative" rather than merely interpretive, and as such, is binding upon the courts. It is presumed that the provision must be read in the manner suggested by the appellant. We disagree on all points.

Recent opinions of the Supreme Court, *see, e.g., Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434, 4440–44 (U.S. April 18, 1979); *Batterton* v. *Francis*, 432 U.S. 416, 424–26 (1977); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140–45 (1976), and the enactment of Section 4 of The Administrative Procedure Act, 5 U.S.C. § 553, have reinforced the distinction first enunciated in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), between legislative and interpretive regulations. The former are issued pursuant to a lawful, express delegation of authority from Congress to the administrative agency to formulate rules having the force or effect of law. As the primary source of legal obligation, they are entitled "to more than mere deference or weight," *Batterton* v. *Francis*, *supra*, 432 U.S. at 426; they are subject to judicial revision only if they are promulgated in excess of the granted power or in contravention of proper procedure, or are utterly capricious and arbitrary. Interpretative rules are administrative regulations issued pursuant to a lesser degree of delegated authority, and in such cases the statute remains the basis for the imposition of liability. The deference which interpretive regulations are accorded depends on such factors as the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation and the nature of the agency's expertise. *Batterton* v. *Francis*, *supra*, 432 U.S. at 425 n.9; *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140.

Thus, legislative rules are reviewed only in terms of validity, while interpretive rules are considered in the more expansive light of their reasonableness, or their rational relationship to their statute's objective. The dividing line is found in the nature of the delegation: always, the question is whether Congress intended to confer upon the agency the power to issue rules having the force and

effect of law. *See, e.g., National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 696–97 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); *see also Joseph* v. *Interstates Civil Service Commission*, 554 F.2d 1140, 1152–54 (D.C. Cir. 1977).

The grant of rulemaking authority involved herein is set forth in 20 U.S.C. § 1605(d)(1), which empowers the Secretary to require in the waiver application such information as may be deemed necessary to the decision, and in section 1605(d)(5) which provides:

> All determinations pursuant to this subsection shall be carried out in accordance with criteria and investigative procedures established by regulations of the Secretary for the purpose of compliance with this subsection.

This delegation of authority is hardly of the same order as that found in *Batterton* v. *Francis*, *supra* (definition of "unemployed" in 42 U.S.C. § 607(a) to be determined "in accordance with standards prescribed by the Secretary"). The grant here is simply a procedural assurance that decisions will be made on the basis of standards publicly elaborated by the Secretary: it does not expressly indicate that those standards themselves shall have the force and effect of law.

Furthermore, the regulation in issue lacks the hallmarks of a legislative rule. Applicants do not assert that it was promulgated in compliance with 5 U.S.C. § 553, requiring notice and opportunity for written comments. Also, HEW has never before asserted that the regulation is of the legislative variety, and the District of Columbia Circuit, in its review of a forerunner provision, proceeded on the implicit assumption, apparently without the agency's objection, that it was an interpretive rule only. *Kelsey* v. *Weinberger*, *supra*.

Having reached this conclusion, we need say little more about 45 C.F.R. § 185.44(d)(3). Insofar as it has been interpreted to require a waiver applicant to prove that the effects of past discriminatory teacher assignments have been remedied, it is invalid as not being rationally related

to the objectives of the ESAA program. Moreover, to the extent that its administrative construction reflects upon Congress' intent, it tends to discredit appellant's position, since the Secretary previously understood a predecessor provision not to require the eradication of discriminatory effects, and the present regulation and its interpretation have only recently been adopted,[12] *see Califano II*, *supra*, 464 F. Supp. at 1122–24.

In light of the foregoing conclusion, we need not reach the question of whether HEW's interpretation of the regulation is requiring immediate and complete remedy of the effects of past misconduct is correct. Although an administrative agency's construction of its own regulation is normally binding upon a reviewing court, *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977), *quoting Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), we note that the interpretation espoused by the Secretary is

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[12] The district court has aptly set forth the chronology as follows:

> The original text of the regulation was identical to its present language. . . . On July 16, 1973, the Secretary of HEW in a notice of proposed rulemaking announced a modification of the regulation to permit waivers of ineligibility for school districts which had not yet fully rectified the effects of the past discriminatory practices in teacher assignments. 39 Fed. Reg. 18894 (1973)
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> . . . .
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> Responding to criticism that the modified regulation conflicted with the statutory standards, the Secretary cogently argued that section 1605 (d)(1) did not require as a condition for granting a waiver the elimination of all effects of past discriminatory practices. He pointed out that the elimination of the actice practice and the adoption of a plan to eliminate the effects satisfied the statutory standard. . . .
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> . . . .
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> The present language of the regulation—conflicting with the Secretary's interpretation—was adopted by HEW only after the Court of Appeals for the District of Columbia, in *Kelsey* v. *Weinberger*, [498] F. 2d 701 (1974), held the then existing regulation invalid.

Califano II, *supra*, 464 F. Supp. at 1122-24. *See also* 38 Fed. Reg. 18899, 21646 (1973); 40 Fed. Reg. 14167 (1975).

in no way compelled by the plain language of the regulation.[13] Our reservations are further heightened by the fact that companion provisions explicitly require the amelioration of the effects of prior discrimination, *see, e.g.*, 45 C.F.R. § 185.44(f), and consequently, it is at least arguable that the Secretary deliberately omitted such a condition from the regulation at issue in recognition of the fact that teachers' rights are often established by contract and are not amenable to overnight change.

V.

OTHER CLAIMS

Finally, appellants contend that the district court abused its discretion in issuing a "preliminary injunction." In particular, HEW complains that Judge Weinstein failed to elaborate the requisite findings of fact, and alleges that he reached erroneous conclusions with respect to the irreparable injury and probable success on the merits requirements of the preliminary injunction test. *Selchow & Righter Co.* v. *McGraw Hill Books Co.*, 580 F.2d 25, 27 (2d Cir. 1978); *Treibwasser & Katz* v. *American Tele-*

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[13] In full text, the regulation provides:

> In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by § 185.43(b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in § 185.11(a), conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole.

45 C.F.R. § 185.44(d)(3).

phone & Telegraph Co., 535 F.2d 1356, 1358 (2d Cir. 1976).

A cursory review of the record below plainly reveals that what is before this Court is an appeal from the grant of a permanent injunction following an expedited trial on the merits held in accordance with Rule 65(a)(2), Fed. R. Civ. P. The relief ordered following that proceeding has not yet been entered as a final judgment since the court below is awaiting the results of the administrative remand. Nonetheless, there is no doubt that Judge Weinstein has gone beyond the issuance of a provisional remedy, and has, following a plenary proceeding concerning which appellant had notice and full opportunity to adduce evidence, found in favor of the Central Board and granted the appropriate equitable relief. Under these circumstances, procedural and substantive standards relating to the issuance of preliminary injunctions simply have no application.

The order of the district court is, in all respects, affirmed. The matter is remanded to the Secretary for further proceedings not inconsistent with this opinion.

#79-6006 BD. OF EDUC.

v.

Patricia R. Harris

I dissent with opinion

JAMES L. OAKES

OAKES, *Circuit Judge* (dissenting):

The majority has gone out of its way to invalidate a regulation of an administrative agency as contrary to congressional mandate. But when one looks at the regulation itself, 45 C.F.R. § 185.44(d)(3), one finds that it does not say what the majority says it says, or what the majority says the agency says it says, but something else. And if the regulation is compared to the underlying statute, it becomes clear that Congress quite expressly authorized, as it so often does, the agency to use its discretion in devising regulations to implement the congressional mandate. I accordingly dissent. I think it serious business—and a serious matter of judicial interference with the executive branch of the federal government—so lightly to overturn an administrative regulation.

What this case involves is a city school system which has been found ineligible for Emergency School Aid Act (ESAA) funds for the school year 1978-79 because of discrimination *inter alia* in the hiring and in the assignment of full-time teachers, principals, and assistant principals to schools in such a manner as to identify certain schools as intended for a particular race or ethnic group.[1] The school system sought a waiver of ineligibility pursuant to 20

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[1] This ineligibility was mandated by 20 U.S.C. § 1605(d)(1)(B) and 45 C.F.R. § 185.43(b)(2). *See Board of Educ.* v. *Califano*, 584 F.2d 576, 588 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 1211 (1979) (*Califano I*). *Califano I* dealt with ESAA funds for the school year 1977-78.

U.S.C. § 1605(d)[2] and 45 C.F.R. § 185.44(d)(3).[3] The reasons given for the denial of the waiver by then HEW Secretary Califano to Chancellor Macchiarola are in pertinent part set forth in the margin. The accompanying report of Mr. Tatel of the Office for Civil Rights is also in pertinent

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[2]The statute provides that

> [n]o educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972 [engaged in certain discriminatory practices] except that, in the case of any local educational agency which is ineligible for assistance [for this reason], such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

20 U.S.C. § 1605(d)(1).

[3]This regulation is quoted in full in note 13 of the majority opinion.

[4]The Secretary stated:

> On June 20, 1978, Dr. Herman R. Goldberg, Associate Commissioner, Equal Educational Opportunity Programs, Office of Education, notified you that your district was ineligible for assistance. This notification was a consequence of your district's failure to meet the requirements for eligibility established by section 706(d) of the Act and sections 185.43(b)(2), 185.43(d)(4), and 185.43(d)(5) of the implementing regulations. Your school district has provided acceptable plans to remedy the discrimination in the assignment of students to racially identifiable or isolated regular classes and in imposing disciplinary sanctions. Nevertheless, your district has failed to remedy the discrimination in the hiring and assignment of minority administrators and teachers.
>
> Your district applied for a waiver of ineligibility of July 7, 1978. However, it failed to provide evidence that the discrimination in the hiring and assignment of minority administrators and teachers had ceased to exist and would not reoccur.
>
> The grounds for my decision to deny your application are set forth in the enclosed report from Mr. David S. Tatel, Director of this Department's Office for Civil Rights. From this report I have determined that your school district has not corrected the violation of section 185.43(b)(2) of the ESAA . . . .

Letter from Secretary Califano to Chancellor Macchiarola (Sept. 28, 1978).

part set forth.[5] Neither the letter denying the waiver, the report accompanying it, nor the regulation under which the denial is made and which the report mentions refer in any place whatsoever to the "effects" of past discrimina-

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[5]The report stated:

> On September 7, 1977, the Central Board and OCR entered into a Memorandum of Understanding that would have remedied the discrimination in hiring and assignment of minority administrators and teachers by 1980. Because the Memorandum of Understanding provided for a phased remedial plan that would not have eliminated the discrimination in hiring and assigning minority administrators and teachers by September 1977, the Department denied the Central Board's request for an ESAA waiver of ineligibility for the 1977–78 funding cycle. Furthermore, the Central Board subsequently abandoned the terms of the Memorandum of Understanding after Judge Weinstein invalidated the agreement on procedural grounds in *Caulfield v. Board of Education*, No. 77–C–2155 (E.D.N.Y. Mar. 15, 1978), appeal pending, No. 78–6035 (2d Cir. filed Feb. 28, 1978).
>
> On July 7, 1978, the Central Board applied for a waiver of ineligibility based on its pending appeal of Judge Weinstein's decision in *Board of Education* v. *Califano*, No. 77–C–1928 (E.D.N.Y. April 18, 1978), upholding the Department's denial of ESAA funds to the Central Board for 1977–78. The Central Board offered no explanation why the pending of the appeal would justify granting an ESAA waiver of ineligibility. More significantly, on August 21, 1978, the United States Court of Appeals for the Second Circuit affirmed Judge Weinstein's decision. *Board of Education v. Califano*, No. 78–6083, 78–6088, 78–8180 (2d Cir. Aug. 21, 1978).
>
> The Central Board has submitted no information or evidence to demonstrate that the discrimination in hiring and assigning minority administrators and teachers has been or will be corrected prior to the commencement of the school year in September 1978. Therefore, the Central Board is not eligible for an ESAA waiver of ineligibility on this issue.

Report by David S. Tatel, Office for Civil Rights.

[6]*See* 45 C.F.R. § 185.44(d)(3), *quoted in* majority opinion, note 13 *supra;* 45 C.F.R. § 185.44(b) ("An application for waiver . . . shall contain such information and assurances as will insure that any practice, policy, procedure, or other activity resulting in ineligibility has ceased to exist or occur, and shall include such provisions as are necessary to insure that such practice, policy, procedure, or activity will not reoccur after the submission of such application.").

tion, a straw man set up in the majority opinion and the opinion below, aided to some extent however by the federal government's arguments in this litigation.

In fact, the denial of the waiver was based on a failure "to remedy the discrimination in the hiring and assignment of minority administrators and teachers." Letter from Secretary Califano, *supra* note 4. This omission was accompanied by a failure to submit "information or evidence to demonstrate that the discrimination in hiring and assigning minority administrators and teachers has been or will be corrected prior to the commencement of the school year in September 1978." Report of David S. Tatel, Office for Civil Rights, *supra* note 5.

The Central Board evidently thinks and the majority implicitly holds that the entry by the Central Board into the Memorandum of Understanding of September 7, 1977, with its phased remedial plan, *see Caulfield v. Board of Education*, 583 F.2d 605 (2d Cir. 1978), may be enough in and of itself to restore its eligibility for ESAA funds and permit the granting of a waiver. To my mind, the Secretary's determination to the contrary was within his own Department's regulations and the regulations, thus applied, conform to the statute.[7] Rather than deciding these issues as they are presented here, the majority deals exclusively with the hypothetical questions of whether a waiver must, under the regulations, be preceded by the elimination of all the *effects* of past discrimination and whether, if so, the regulations are valid under the statute. The determinations arrived at are therefore unwarranted in the present context.

Let me be more precise. There are several ways in which a school district may, under 20 U.S.C. § 1605(d), discriminate and render itself ineligible for ESAA funds. It may aid segregated private schools, discriminate in its dealings with staff, segregate children within a school for a significant portion of the day, or take other actions, "such as limiting curricular or extracurricular activities,"

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[7] 20 U.S.C. § 1605(d).

that discriminate among children on the basis of race or ethnic origin. *Id.* § 1605(d)(1). Before a waiver is granted, the Secretary must ensure that any such "practice, policy, or procedure, or other activity resulting in the ineligibility" has ceased to exist or occur and will not reoccur. *Id.*

The New York City Central Board had engaged in several of the disqualifying violations enumerated in the statute and regulations. They were violating § 1605(d)(1)(B) (demotion or dismissal of minority group personnel) and § 1605(d)(1)(D) (imposing disciplinary sanctions against children in a discriminatory way), as well as teacher and administrator assignment provisions of § 1605(d)(1)(B). But the ESAA funds were denied only because of a failure to correct the discriminatory assignment of teachers and administrators. HEW took this action because its regulation requires that, prior to any waiver, "the proportion of minority group full-time classroom teachers at each school [be] between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole." 45 C.F.R. § 185.44(d)(3). This provision is similar to the other waiver regulations, which generally require that the disqualifying violation be corrected prior to a waiver, although there is provision for a gradual remedy when the violation is disproportionate dismissal or demotion of personnel. *Id.* § 185.44(d)(1)(i).

Clearly, HEW correctly applied its regulation, because the district had failed to alter its teacher assignments in any way. The Memorandum of Understanding that was entered into on September 7, 1977, which was to provide a phased remedial plan, did not, in itself, effect any change at all. It was not even aimed at obtaining ESAA funds. As the opinion in *Caulfield v. Board of Education*, 583 F.2d 605, 607–10 (2d Cir. 1978), discussing that Memorandum makes very clear, it was aimed at securing compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d–6, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1686.[8] Because

[8]Title IX deals with practices discriminatory against *females*. The Title VI violations involved discriminatory teacher selection and test-

the City Board had to come to terms with the teachers' union, perhaps for other reasons, all of which are immaterial here, the compliance by it was to be phased in so as "to remedy the discriminatory effect of those practices on a phased basis by 1980." *Caulfield, supra*, 583 F.2d at 607.

Thus, what the majority does now is to deny HEW's power to implement the statute by the present regulations. It does so by imagining an entirely different regulation—one requiring the prior eradication of all the lingering, indirect effects of past discrimination—and concluding that such a rule is undesirable because effects of discrimination may last "for a generation, or longer." Majority opinion at 20. The majority also makes one more fundamental error in its reading of the statute. it suggests, majority opinion at 21-22, that segregation of children within a district as a whole is a violation that may disqualify a district. It goes on to conclude that, under its existing regulations, HEW would grant a waiver only to districts that have already fully desegregated—*i.e.*, districts that no longer really need the money. *Id.* This result would indeed be somewhat absurd, but the structure of the Act as a whole makes it clear that funds may be granted to districts that are still implementing plans for desegregating student bodies, *see* 20 U.S.C. § 1605(a)(1), and that existing school segregation itself was not intended as a violation that would cause ineligibility, *see id.* § 1605(d)(1) (listing violations). Referring to the list of disqualifying violations, then Senator Mondale stated: "The application of these safeguards is crucial. The value of *integrated* education to the children involved in the programs under this act will be lost if discrimination continues to be practiced *within schools which are desegregated.*" 117 Cong. Rec. 10758 (1971) (emphasis added). The

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ing procedures and racially identifiable employment pools as well as teacher and administrator assignments reinforcing racial/ethnic identifiability (also, concededly, involved in the instant case) and assignment of less experienced, lower salaried, less qualified teachers to minority-preponderant schools. *Caulfield v. Board of Educ.*, 583 F.2d 605, 608 n.3 (2d Cir. 1978).

violations are thus discrete actions, other than segregation of students itself, that may take place in the context of an overall process of school desegregation.

This conclusion fits well with the overall statutory scheme. ESAA, as *Califano I* attempted to point out, 584 F.2d at 578–81, is a special funding act, supplementing an eligible nondiscriminatory school district's funds "to aid in desegregating schools and support quality integrated schools." S. Rep. No. 604, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2595, 2600. These funds, which are limited in amount in any given school year in accordance with congressionally set national priorities, are in effect awarded on a competitive, "merit," point-award basis to those school districts that have demonstrated eligibility by "objective criteria," *Califano I*, supra, 584 F.2d at 579 n.4. Funds are awarded "to qualified applicants in the order in which their applications are ranked." *Id.* at 579. Congress was extremely careful to make sure that the requirements were uniform nationwide irrespective of the type of discrimination practiced, de facto or de jure. *Id.* at 578 n.3. The Act was thus both a carrot and a stick, to North and South alike, affirmatively promoting the policies of *Brown v. Board of Education*, 347 U.S. 483 (1954).

The Act specifically set forth strict criteria for the award of funds, in the words of Senator Mondale, "strong safeguards," "administrative guidelines," and "mandatory directions"[9] to try to assure proper administration of the Act. And Congress was very specific in its waiver provisions to provide *nondelegable* approval only by the Secre-

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[9] 117 Cong. Rec. 10758 (1971). The Senator stated:

> It is because of the history of the emergency school assistance program that the Labor Committee has included in the bill strong safeguards modeled upon those added in the Senate to the emergency school assistance program appropriation. The committee has also, both in the bill and the report set forth mandatory directions to the Commissioner to try to assure proper administration of this program.

tary himself, 20 U.S.C. § 1605(d)(2),[10] with a grant to be made only "upon determination that any practice, policy, procedure or other activity resulting in ineligibility has ceased to exist . . . .," *id.* at § 1605(d)(3), and with his determination to be "carried out in accordance with criteria and investigative procedures established by regulations of the Secretary for the purpose of compliance with this subsection." *Id.* at § 1605(d)(5). To suggest, as the majority opinion does, that the grant of power here is "simply a procedural assurance," majority opinion at 24, and that the regulation here in question, 25 C.F.R. § 185.44 (d)(3), is not "rationally related to the objectives of the ESAA program," majority opinion at 24, is to usurp the agency's functions.

To give the majority their due, I do not believe that a regulation adopting their view would necessarily be invalid, *but see Kelsey v. Weinberger*, 498 F.2d 701 (D.C. Cir. 1974), despite the apparently clear statutory requirement that the practice of assigning teachers to racially identifiable schools cease to exist or occur prior to a waiver. *See* 20 U.S.C. § 1605(d)(1). HEW should have, and I believe was given by Congress, certain flexibility in this area. In addition, there is a certain ambiguity in the statute created by the fact that faculty segregation is included both in § 1605(a), which discusses the kinds of ongoing desegregation that the Act seeks to encourage through funding, and in § 1605(d)(1), which, as I have noted, lists various practices that, until corrected, disqualify a district from receiving funds to aid its overall desegregation effort. Faced with this apparent contradiction, the administering agency *might* reasonably conclude that faculties need not be desegregated before a waiver is granted. But it might also conclude that the process of faculty desegregation, unlike that of student desegregation, is, because of § 1605(d)(1), only intended to be funded

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[10] All waivers must also be in writing, with prior notice given to specific congressional committees, 20 U.S.C. § 1605(d)(6). These extraordinary requirements to me demonstrate that Congress was extremely fearful that waivers would be granted too quickly or easily.

after the remedy has been substantially effected. A situation of such apparent ambiguity is, it seems to me, clearly one where deference to the HEW interpretation is warranted, indeed required, regardless of whether the regulations are deemed "interpretive" or "legislative." *See generally Batterton v. Francis*, 432 U.S. 416, 424-26 (1977). When two interpretations are possible, and neither would frustrate the legislative scheme, we should follow the regulation.

The majority opinion ultimately fails to state what HEW may now do. It may be that their invalidation of the statute means that HEW *must* now grant the waiver, because the Memorandum is a sufficient indication that the district will no longer discriminate. If so, I am concerned about how today's decision will affect future school desegregation.

Presumably the Department will be reluctant to enter into memoranda of understanding similar to the one entered into here, providing for phased-in compliance, lest agreement thereto immediately render eligible for ESAA funds, on the basis of its "good intentions," a district that has highly segregated faculty assignments. This would be a sorry combination of events since there is a statutory admonition to all federal agencies under the Civil Rights act of 1964, 42 U.S.C. § 2000d-1, to secure voluntary compliance with that Act's provisions. And, while I agree with the majority in that I do not believe Congress necessarily meant defiant applicants to do "an additional penance," majority opinion at 17, I do believe that Congress knows as well as any other branch of government with what the road to Hell is paved. I think Congress was perfectly prepared to permit the Department under Department regulations to insist upon a little more from its ESAA applicants than the paving stones the majority relies on here.

If, on the other hand, under the majority opinion and "remand" HEW still has some power to deny the waiver sought by appellee—a power based on the statutory requirement that the Secretary ensure that the discrimination has ceased—it is unclear how the majority decision

has altered the status quo under the regulations. Such a power is no more and no less than what the regulations have embodied all along—the power to make sure that teachers are no longer assigned to schools on the basis of race or ethnic origin.

But perhaps the majority has yet a third view. Maybe it feels that HEW can require more than a Memorandum of Understanding, but less than a real change in teacher assignments. If so, that view is nowhere spelled out or explained. The opinion, where light is needed, creates only fog or, if under the first alternative suggested it *requires* the agency to treat the mere entering into the Memorandum of Understanding as sufficient to constitute compliance, darkness. I therefore dissent.

APPENDIX B

United States Court of Appeals for the Second Circuit

79-6006

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November, one thousand nine hundred and seventy-nine.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Present: Hon. JAMES L. OAKES, *Circuit Judge*
Hon. THOMAS J. MESKILL, *Circuit Judge*
Hon. CHARLES E. STEWART, *District Judge*

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al. Plaintiffs-Appellee

v.

JOSEPH A. CALIFANO, JR., et al. Defendants-Appellants

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

/s/ _____

BY: ARTHUR HELLER,
Deputy Clerk

APPENDIX C

United States Court of Appeals for the Second Circuit

ORDER ON PETITION FOR REHEARING

No. 1079—August Term, 1978

(Argued June 5, 1979
Decided November 19, 1979)

(Petition for rehearing filed December 14, 1979
Decided May 19, 1980)

Docket No. 79-6006

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND FRANK MACCHIAROLA, CHANCELLOR OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *Plaintiffs-Appellees*,

v.

PATRICIA R. HARRIS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HERMAN B. GOLDBERG, ASSOCIATE COMMISSIONER, EQUAL EDUCATION OPPORTUNITY PROGRAMS, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE AND DAVID S. TATEL OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *Defendants-Appellants*.

Before: OAKES AND MESKILL, *Circuit Judges*, AND STEWART, *District Judge*.*

*Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, sitting by designation.

MESKILL, *Circuit Judge:*

The government, in its brief, contends that our opinion is inconsistent with the subsequent Supreme Court decision in *Board of Education of the City School District of New York* v. *Harris*, 48 U.S.L.W. 4035 (U.S. Nov. 28, 1979). Not only do we think our decision is not inconsistent with the Court's decision, we think it is in fact supported by the language of that opinion.

The Government contends that we had construed the statute as requiring the application of an intentional [discrimination] standard while the Court held that the Act was intended to apply to *de facto* as well as *de jure* discrimination. For the same reason the amicus brief argues that we improperly relied upon the Memorandum of Understanding's compliance with Title VI of the Civil Rights Act of 1964. Both briefs simply overlook what we decided. We explicitly stated that ESAA insists "on a single national standard for the distribution of these federal funds," citing to Section 1602(b) of 20 U.S.C. which provides:

> It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether dejure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Slip op. 5426 and at n. 10. We did not distinguish between intentional and nonintentional discrimination, but rather, between the *maintenance* of either form of discrimination and a *policy of elimination of* either form of discrimination:

> What must cease to exist or occur in order for an applicant to qualify for a waiver of ineligibility is its current acceptance of the status quo. It would seem therefore, that if the Central Board has adopted a policy of eliminating discrimination in a manner approved by HEW, as demonstrated by its commitment to the Memorandum of Understanding, then "prac-

> tices," "procedures" and "other activities," undertaken in furtherance of that policy cannot logically be described as having resulted in the ineligibility.

Slip op. at 5420.

The government and the amicus briefs argue that we overlooked the portion of legislative history referred to in the Supreme Court's opinion, 48 U.S.L.W. at 4040 and n.12. Although referred to by the Court as having "some significance," the Court does not indicate in what manner it would affect the construction of the waiver-of-ineligibility provisions. Indeed, the Court's statement, a few paragraphs later, that ". . . ESAA funds are available for the furtherance of a plan to combat *de facto* segregation," 48 U.S.L.W. at 4040 (emphasis added), indicates that, whatever the significance of this legislative history, our construction of the waiver-of-ineligibility provision comports with the Court's perception of the objectives of the statute.

For these reasons we do not think a different result is mandated by the subsequent Supreme Court opinion in *Board of Education of the City School District of New York* v. *Harris*, *supra*.

Petition for rehearing is denied.[1]

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[1] Judge Oakes adheres to his previous view.

APPENDIX D

United States Court of Appeals

SECOND CIRCUIT

79-6006

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of May, one thousand nine hundred and eighty.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND FRANK MACCHIAROLA, CHANCELLOR OF THE CITY SCHOOL DISTRICT OF NYC. *Plaintiffs-Appellees*,

v.

JOSEPH A CALIFANO, JR. Secretary, U.S. Dept. of Health, Education and Welfare, HERMAN B. GOLDBERG, Associate Commissioner, Equal Educational Opportunity Programs, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE AND DAVID S. TATEL, Office for Civil Rights, U.S. Dept. of Health, Education and Welfare, *Defendants-Appellants*

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Appellants, and a poll of the active judges having been taken, and a majority thereof having voted against rehearing en banc,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judges Oakes, Newman, and Kearse voted in favor of rehearing en banc.

/s/ _____
IRVING R. KAUFMAN,
Chief Judge

APPENDIX E

United States District Court
Eastern District of New York

78-C-2135

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PLAINTIFFS,

v.

JOSEPH CALIFANO, JR., SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., DEFENDANTS.

AMENDED, MEMORANDUM AND ORDER

WEINSTEIN, D.J.

An application by the plaintiff, the New York City Board of Education, for 1978-79 funding under the Emergency School Aid Act (ESAA), 20 U.S.C. § 1601 *et seq*, (Supp. II 1972) has been denied by the defendant, the Department of Health, Education and Welfare (HEW) on the ground that the Board is ineligible because it "had in effect . . . [a] practice, policy or procedure" of discrimination on the basis of race in assigning teachers after June 23, 1972. 20 U.S.C. § 1605(d)(1)(B) (Supp. II 1972). The Board's request for a waiver of ineligibility, pursuant to 20 U.S.C. § 1605(d)(3) (Supp. II 1972), has also been denied on the theory that a waiver is not available until the effect of the discriminatory practice has been fully eliminated; HEW maintains that teachers must have been reassigned "so that no school is identified as intended for students of a particular race." 45 C.F.R. § 185.44(d)(3).

HEW has an unduly limited view of its statutory discretionary powers to grant waiver. Since this misapprehension is based upon an error of law, this court has power to grant relief. 5 U.S.C. § 706. For the reasons discussed below, the matter must be remanded for further consideration.

I. PRECEDING EVENTS

A. Underlying Facts

An explanation of HEW's denial of the Board's application for 1978–79 funding requires some retracing of the events of the past three years.

In March of 1976 HEW's Office of Civil Rights (OCR) notified the Board that its employment practices, particularly the discriminatory methods of selection and assignment of teachers, violated laws barring discrimination in federally financed programs. 42 U.S.C. § 2000d; 20 U.S.C. § 1681. Among OCR's findings was one that the Board had "assigned teachers, assistant principals and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools." *Caulfield* v. *Board of Ed. of City of New York*, 583 F.2d 605, 608 n. 3 (2d Cir. 1978). OCR requested a remedial plan.

An application for 1977–78 ESAA funding was filed by the Board in January, 1977. HEW denied the application because of the Board's discriminatory teacher assignment practices. OCR's findings made the Board ineligible for ESAA funding under the statute and regulations absent a waiver by HEW.

Opinions by this court and the Court of Appeals have found substantial basis for these administrative decisions. *See Board of Ed. of City Sch. Dist. Etc.* v. *Califano*, 584 F.2d 576 (2d Cir.), *petition for rehearing denied*,— F.2d—(1978); *Board of Education* v. *Califano*, No. 77-C-1928 (E.D.N.Y. 1977). A writ of certiorari challenging denial of 1977–78 funds is now before the Supreme Court. The Court of Appeals has stayed the transfer of the 1977–78 ESAA funds previously earmarked for the Board pending a determination by the Supreme Court.

On September 7, 1977, the Board and OCR entered into a Memorandum of Understanding detailing a plan to remedy the challenged employment practices. This Memorandum obligated the Board to promptly begin a program that would within three years eliminate the effects of the alleged discrimination in the selection or assignment of teachers and supervisors. Execution of the plan, OCR has agreed, will constitute compliance with federal statutes. The full text of the agreement is set out as an appendix to the opinion of this court in *Caulfield* v. *Board of Ed. of City of N.Y.*, 449 F.Supp. 1203, 1227–1230 (E.D.N.Y. 1978) which describes its history in some detail.

New York City teachers, supervisors, and administrators have brought two related actions challenging the implementation of the September 7 agreement. *See generally Caulfield* v. *Board of Ed. of City of N.Y.*, 449 F.Supp. 1203 (E.D.N.Y. 1978). A procedural due process objection to the proceedings leading to development of the plan has been rejected by the Court of Appeals. *See Caulfield* v. *Board of Ed. of City of New York*, 583 F.2d 505 (2d Cir. 1978), *reversing Caulfield* v. *Board of Ed. of City of N.Y.*, 449 F.Supp. 1203 (E.D.N.Y. 1978). Substantive objections to the legality and constitutionality of the plan, however, are still before this court.

The present action concerns the Board's application for 1978–79 ESAA funding. In June 1978, HEW informed the Board that it was still ineligible under the ESAA statute and regulations. This determination of ineligibility relied in large part upon the data collected in the 1976 OCR investigation that had also constituted the basis for the denial of 1977–78 ESAA funding. Reliance for the ruling was placed on 20 U.S.C. § 1605(d)(1)(B) (Supp. II 1972), and its implementing regulation, 45 C.F.R. § 185.43(b)(2). Both trigger ineligibility upon any discriminatory hiring or assignment practice that occurs *"after June 23, 1972"* (emphasis supplied); thus, the 1975–76 data collected in the OCR investigation can constitute a basis of ineligibility for the application for 1977–78, 1978–79, and any following years.

Subsequently the Board filed an application for a waiver of ineligibility for 1978–79 funding pursuant to 20 U.S.C. § 1605 (Supp. II 1972) and its implementing regulations, 45 C.F.R. 185.43(b)(2), 185.43(d)(4) and 185.43(d)(5). By letter dated September 28, 1978, HEW denied the application on the ground that a waiver is possible only when the effects of the discriminatory practice have been fully eliminated, that is, when teachers and supervisors have actually been reassigned "so that no school is identified as intended for students of a particular race." 45 C.F.R. § 185.44(d)(3).

B. Procedure in this Court

This court has held hearings on applications for a temporary restraining order and preliminary injunction requiring HEW to preserve and set aside the 1978–79 ESAA funds for which the Board appeared to be eligible absent findings of discrimination. Without such a stay and injunction the funds previously set aside by HEW for the Board for the 1978–79 school year would have been reallocated to other school districts; both the City and the students in its schools would have suffered a permanent loss. Upon appropriate findings, preliminary relief was granted. The parties agreed that no oral testimony would be offered and that the application for a final injunction should be decided upon the administrative record and other documents submitted to the court.

II. Statutory Scheme

Congress passed ESAA as Title VII of the Education Amendments of 1972. Pub. L. No. 92–318, tit. VII, § 701–720, 86 Stat. 354 (1972), 20 U.S.C. §§ 1601 *et seq.* (Supp. II 1972). The Act provides financial assistance to local educational agencies and other eligible organizations to promote the elimination of the effects of discrimination and other minority disadvantages. 20 U.S.C. § 1601(b) (Supp. II 1972). Funding is available for a variety of enumerated activities that further these goals. 20 U.S.C. §§ 1606–1608, 1610 (Supp. II 1972). The Second Circuit

has described the legislation as "a program purposefully designed 'to aid in desegregating schools and support quality integrated schools.' " *Board of Ed. of City Sch. Dist., Etc.* v. *Califano*, 584 F.2d 576, 578 (2d Cir. 1978), quoting S. Rep. No. 604, 92d Cong., 2d Sess. (1972).

Distribution of ESAA funds is administered by HEW's Assistant Secretary for Education. His discretion is limited both by the Act and by administrative regulations adopted pursuant to the Act by HEW's Office of Education. 45 C.F.R. § 185.01 *et seq.*, 38 Fed. Reg. 3452 (Feb. 6, 1973).

An applicant must demonstrate that it is implementing one of three types of desegregation plans: "a plan undertaken pursuant to the order of a court or other appropriate body, a plan approved by HEW as adequate under Title VI, or one of several types of voluntary plans." *Robinson* v. *Vollert*, 411 F.Supp. 461, 465 (S.D. Texas 1976) (summarizing 20 U.S.C. § 1605(a)). In addition to establishing eligibility, an applicant must also show that it has not become ineligible by engaging in any of the disqualifying acts, practices, policies or procedures prohibited by the statutes and regulations. 20 U.S.C. § 1605(d)(1) (Supp. II 1972); 45 C.F.R. § 185.13(1). The statutory disqualifying provision involved in this case makes ineligible any local educational agency that has in effect, after June 23, 1972, a practice, policy or procedure of discrimination in the hiring, promotion or assignment of its employees. 20 U.S.C. § 1605(d)(1)(B) (Supp. II 1972). It provides:

> (d)(1) No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> * * *
>
> (B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment

> of employees of the agency (or other personnel for whom the agency has any administrative responsibility);

The accompanying administrative regulation prohibits the assignment of full time teachers "in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin." It reads:

> (2) No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.

45 C.F.R. § 185.43(b)(2).

Once an applicant has been found ineligible, ESAA funds are available only if a waiver of ineligibility is granted. The Act conditions the granting of a waiver upon the cessation of the activity which led to ineligibility. There must be a:

> determination that any practice, policy, procedure or other activity resulting in ineligibility has ceased to exist, and that the applicant has given satisfactory assurance that the activities prohibited in [the subsection defining ineligibility] will not reoccur.

20 U.S.C. § 1605(d)(3) (Supp. II 1972). Promulgation of waiver regulations which "insure that any practice, policy or procedure, or other activity resulting in the ineligibility has ceased to exist or occur . . . [and] that such activities do not reoccur . . . ." is permitted by the Act. 20 U.S.C. § 1605(d)(1) (Supp. II 1972). The regulation governing the requirements for a waiver when the ineligibility resulted from the discriminatory assignment of teachers provides that no school shall be identified by race on the basis of the

teachers assigned to it, and specifies allowable ranges of racial disparities.

> (3) In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by § 185.43(b)(2, such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such nondiscriminatory assignments shall, in the case of a local educational agency implementing a plan described in § 185.11(a), conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole.

45 C.F.R. § 185.44(d)(3).

III. DENIAL OF THE APPLICATION FOR A WAIVER

The Board's challenge to the validity of HEW's denial of the application for a waiver of ineligibility for 1978–79 ESAA funding is the issue now before us.

A. Statutory Text

HEW primarily argues from the text of the statute. Section 1605(d)(1) provides that a waiver is available only when the discriminatory "practice, policy, procedure or other activity" that created the ineligibility has "ceased to exist or occur." 20 U.S.C. § 1605(d)(1) (Supp. II 1972). The plain meaning of this language, it is urged, requires the Board to establish (1) that any past discriminatory teacher assignment practices have ceased, and (2) that the effects of such past policies have been eliminated:

> What must "cease to exist" is not only the causes but also the effects for until the effects have been sufficiently corrected, the causes cannot be said to no longer be operative . . . . The maintenance of a discriminatory state of affairs thus also constitutes a practice, policy, procedure or activity which continues to render a district ineligible.

Supplemental Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Defendants' Cross-Motion for Summary Judgment, pp. 6–7.

We reject HEW's reading of the statute. To be sure, section 1605(d)(1) requires that something have "ceased to exist" before a waiver can be granted, but the provision defines that something as the past "practice," "policy," "procedure," or "activity" of the applicant. These are all active nouns; they look to the past conduct or "intentional" non-action of the applicant, not to the present effects of that conduct. Accepting HEW's suggestion that eliminating causes also requires the elimination of all traces of effects would blur distinctions between the concepts of cause and effect. To argue that the continued existence of the effects of past discrimination alone constitutes a present policy of discrimination makes little sense in the context of this case when the applicant Board has committed itself, in the Memorandum of Understanding, to a program of eliminating those effects. A school board's inaction, in the face of knowledge of past discrimination and its effects, might itself be deemed a "policy" of intentional discrimination—for the "foreseeable consequences" of such nonaction might well be the perpetuation of discriminatory practices and effects, *Hart* v. *Community School Board of Education, New York School District #21*, 512 F.2d 37, 51 (2d Cir. 1975). But we need not now determine whether such culpable inaction is present in this case—initially that is a determination for HEW to make upon remand.

Had Congress intended to condition the granting of a waiver upon the elimination of all the effects of past discrimination, it could have added a term to its enumeration of "practice," "policy," "procedure," and "activity" to con-

vey that intent. As the language now stands, it must be read to permit HEW to allow or deny a waiver to an applicant that has eliminated past discriminatory practices but not yet all their effects. HEW is not, of course, precluded in the exercise of its discretion to grant a waiver, from considering such factors as the time that has elapsed since adoption of the Act, the extent of the remaining effects, and the speed with which those effects are being eliminated.

B. Legislative History

Analysis of the legislative history supports this conclusion. The debates preceding the enactment of ESAA reflect Congressional awareness that solutions to the innumerable problems accompanying desegregation often cost more than school districts can afford:

> The implementation of desegregation plans and the elimination of dual systems have drained the resources of many school districts threatening the quality of education for all children . . . . We know that there are added costs of special programs and personnel to effect segregation with the minimum possible disruption to the primary educational function of our schools. It is only fair that the Federal Government should assume part of the financial burden.

117 Cong. Rec. 5285–86, 92d Cong., 1st Sess. (1971) (remarks of Representative Fascell). Numerous educational organizations had called upon Congress for federal funding to help ease this financial strain:

> The bill recognizes that desegregation costs money. In many cases, to achieve successful desegregation or reduction or prevention of racial isolation, a school district will have to undertake new and expensive programs . . . . The Legislative Conference of National Organizations, representing the American Association of School Administrators, the Council of Chief State School Officers, the National Association of State Boards of Education, the National Congress of Parents and Teachers, the National Education Association, placed assistence for desegregating school districts high on their list of priorities in their

> January 12 statement of proposal for education legislation. In this statement, they urged the Congress to pass legislation recognizing the additional costs entailed by court ordered or voluntary desegregation.

117 Cong. Rec. 511-12, 92d Cong., 1st Sess. (1971) (remarks by Representative Bell, introducing a version of the Act). Congress made this need for federal financial support of desegregation the premise of the Act in its statement of findings and purpose:

> The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

20 U.S.C. § 1601 (Supp. II 1972).

There can be no doubt that Congress expected that ESAA funds would be used to assist the process of desegregation. The committee reports contain numerous declarations that ESAA funding was intended to aid local school districts to "plan comprehensively for the elimination of racial minority group isolation in their schools . . . ." H.R. Rep. No. 576, p. 1, 92d Cong., 1st Sess. (1972), and to "implement plans for a variety of programs designed to end minority group isolation." S. Rep. No. 604, p. 8, 92d Cong., 2d Sess. (1972). *See* S. Rep. No. 61, p. 2, 92d Cong., 1st Sess. (1972). The Act's statement of purpose declares this same goal of funding efforts to eliminate the effects and indicia of segregation:

> The purpose of this chapter is to provide financial assistance—
>
> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

20 U.S.C. § 1601 (Supp. II 1972).

The scheme of the Act reflects the same legislative intent. The threshold requirement for eligiblity for funding is the existence of an approved desegregation plan. *See* 20 U.S.C. § 1605 (Supp. II 1972); H.R. Rep. No. 576, p. 2, 92d Cong., 1st Sess. (1972); S. Rep. No. 61, p. 2, 92d Cong., 1st Sess. (1971). Funding is available to school districts voluntarily choosing to desegregate and to school districts compelled to desegregate by court or agency order—dramatically indicating that the overriding legislative goal was to support the process of desegregation, regardless of past culpability of the school district. *See* 20 U.S.C. § 1605 (Supp. II 1972); H.R. Rep. No. 576, p. 2, 92d Cong., 1st Sess. (1972); S. Rep. No. 61, p. 2, 92d Cong., 1st Sess. (1971); 117 Cong. Rec. 38485, 92d Cong., 1st Sess. (1972) (remarks of Mr. Bell, a co-sponsor of one version of the Act); 117 Cong. Rec. 38491, 92d Cong., 1st Sess. (1971).

The clear implication of this legislative history is that Congress intended, as a basic principle of the legislation, that ESAA funding be available for school districts that had not yet eliminated all the effects of past discriminatory practices. It is almost too obvious to state that this principle must be implicit in an Act that requires applicants for funding to have plans to eliminate the effects of past discriminatory policies, *see* 20 U.S.C. § 1605(1)(A)(i) and (ii), and that directs HEW to evaluate the applications by the degree to which they will eliminate such effects. *See* 20 U.S.C. § 1609(C)(2) (Supp. II 1972); 20 U.S.C. § 1609(a)(7) (Supp. II 1972).

HEW contends, however, that this basic legislative intent to fund the elimination of the effects of past discriminatory practices does not apply equally to the different classifications of applicants established by the Act. Section 1605 classifies applicants for ESAA funding into three groups: (1) applicants with a "plan" satisfying the threshold eligibility requirements: (2) applicants who have satisfied the threshold eligibility requirements but who are ineligible because they have committed one of the prohibited practices after the cut off date of June 23, 1973;

and (3) ineligible applicants who have obtained a waiver of ineligibility. 20 U.S.C. § 1605 (Supp. II 1972). HEW argues that Congress intended to finance the elimination of the effects of discrimination in only those school districts that have not committed one of the prohibited practices after the cut off date; any school district committing such a practice after that date can, it is urged, receive funding only when the effects of the past discriminatory practice have been eliminated.

We reject HEW's contention. The basic purpose of the Act—funding the process of desegregation—would be frustrated by attaching such critical significance to June 23, 1972. Our interpretation is that discriminatory practices after that date make ESAA funds unavailable unless the practice has ceased and a waiver is obtained so that ESAA funds can be used to eliminate the effects of past discrimination.

The date itself indicates the untenability of HEW's position. It is the date on which the provision was adopted. 20 U.S.C. § 1601, p. 559 (West 1978). No one could have predicted that date as a cut off of the power to grant a waiver. Had the date been fixed some years prospectively, the argument might make some sense since Congress might have set it as a warning that corrective action must be taken before that date or funds under ESAA would be forever barred. But no school board could have responded to the Act by shutting off discriminatory acts on less than 24 hours notice; institutions cannot be turned on and off by the flick of a switch. Schools then discriminating were not barred absolutely from ESAA funds on the same date the Act became effective. Even the use of the word "waive"—"to refrain from pressing (an objection . . .)" Oxford Universal Dictionary (3d ed.)—connotes forgiveness on conditions, rather than unrelenting punishment.

No substantial legislative history exists explaining the purpose of either the cut off date creating automatic ineligibility or the waiver procedure. The scraps of legislative history that do exist suggest only a recognition of the need for a safeguard procedure to ensure that ESAA funds

were not channeled to school districts that continued to discriminate. *See* 117 Cong. Rec. 512, 92d Cong., 1st Sess. (1971) (remarks of Representative Bell, an introducer of the bill); 117 Cong. Rec. 10759, 92d Cong., 1st Sess. (1971) (remarks of Senator Mondale, Chairman of the Labor Committee); Hearings on H.R. 17846 before the General Subcommittee on Education of the House Committee on Education and Labor, p. 570, 91st Cong., 2d Sess. (1971); Hearings on S. 3883 before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, p. 97, 91st Cong., 2d Sess. (1971). An applicant for funding like the Board which has adopted an HEW approved Memorandum of Understanding ending past discriminatory practices and planning concrete steps to eliminate their effects poses no such danger. The implementation of the HEW approved Memorandum insures satisfaction of the legislative intent that funds be denied to school districts actively discriminating; the Memorandum initiates a program of active desegregation. Thus, the basic legislative design of funding desegregation would be best promoted by permitting HEW to exercise its discretion to grant or withhold a waiver to an applicant that has adopted a plan to eliminate the results of a past discriminatory practice that created ineligibility, is promptly, actively and in good faith carrying out that plan, but has not yet fully eliminated that practice's effects. Surely it would be anamolous, in the face of the clear Congressional desire to fund desegregation efforts, if the statute were read to preclude any possibility of a waiver and funding to an applicant that has agreed to an HEW approved plan designed to eliminate the effects of discriminatory teacher assignments.

The legislative intent would, of course, be frustrated if an applicant could agree to plan to end discriminatory practices, receive federal funding, and then continue those practices. This possibility poses little danger, however, since HEW retains the power to cut off funding on the ground that the past "practice" or "policy" of discrimination has not "ceased to exist" as section 1605(d)(1) requires. *Cf. Board of Education, Cincinnati* v. *H.E.W.*,

396 F.Supp. 203, 239 n. 22 (S.D. Ohio 1975), *rev'd in part on other grounds*, 532 F.2d 1070 (6th Cir. 1976) (suggesting that HEW could sue for injunctive relief to enforce such a plan).

C. History of the Implementing Regulation

HEW regulation 45 C.F.R. 185.44(d)(3) does require a waiver applicant, ineligible due to discriminatory teacher assignments, to demonstrate that the effects of such past discriminatory practices have been eliminated—i.e., that "such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color or national origin." If this regulation were even "reasonably related" to the purposes and provisions of the Act we would be constrained to enforce it. *See, e.g., Lau* v. *Nichols*, 414 U.S. 563 (1974). It is not so related. The regulation's requirement that the effects of past discriminatory practices be totally eliminated frustrates both the primary purpose of the Act and the statutory provision, 20 U.S.C. § 1605(d)(1) (Supp. II 1972), defining the standard for granting a waiver. Regulation 45 C.F.R. 185.44(d)(3) is invalid to the extent that it prevents such a waiver.

This regulation's administrative history supports the interpretation of the statutory waiver standard that we adopt. The original text of the regulation was identical to its present language. 38 Fed. Reg. 3463, 45 C.F.R. § 185.44(d)(3). On July 16, 1973, the Secretary of HEW in a notice of proposed rulemaking announced a modification of the regulation to permit waivers of ineligibility for school districts which had not yet fully rectified the effects of the past discriminatory practices in teacher assignments. 39 Fed. Reg. 18894 (1973). The new regulation required only that school districts adopt a plan designed to eliminate all racially or ethnically identifiable schools within a reasonable time but in no event later than the two year period ending with the commencement of the 1975–76 school year. This regulation, promulgated on August 16, 1973, provided:

§ 185.44 Waiver of ineligibility.

* * * * *

(d) Demotion or dismissal of minority group personnel:

* * * * *

(3) In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by § 185.43(b)(2), such applications for waiver shall contain evidence that such agency has adopted and implemented a nondiscriminatory assignment policy. In the case of a local educational agency implementing a plan described in § 185.11(a), such evidence shall indicate that such agency is complying with the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty such evidence shall include at a minimum:

(i) Adoption by such agency of a policy of nondiscriminatory assignment of faculty and staff members;

(ii) Determination of all faculty and staff assignments made after the date of application for waiver in a manner which does not contribute to or reinforce the facial or ethnic identifiability of any school operated by such agency;

(iii) Adoption of a plan to eliminate all full-time teaching faculties composed exclusively of members of a single racial or ethnic group no later than the end of the period for which assistance is to be awarded; and

(iv) Adoption of a plan for assignment of faculty and staff members which will eliminate all racially or ethnically identifiable faculties at schools operated by such agency within a reasonable period of time but in no event later than the commencement of the 1975–76 academic year. In the case of school districts in which the percentage of minority group members on the full-time teaching faculty is less than the percentage of minority group members in the student body, such plans shall include a plan of affirmative action to increase the percentage of minority group members on the full-time teaching faculty of such agency.

38 Fed. Reg. 21646.

The notice of proposed rulemaking declared that the original regulation requiring the elimination of the effects of past discrimination frustrated the primary purpose of the legislation by denying support to desegregating school districts in serious need of financial aid:

> In the administration of the Emergency School Aid Act it was determined that in some cases major metropolitan school districts, because of their size, were unable to satisfy the requirements for eligibility or waiver contained in 45 CFR 185.43(b)(2) and 185.44(d)(3) which deal with discrimination in faculty assignment. These districts were able to demonstrate serious need for the assistance provided by ESAA; had submitted proposals which were rated at a level which would have permitted funding but for their ineligibility; and had demonstrated a commitment to the elimination of discrimination in faculty assignment.
>
> In order to meet the critical needs for assistance demonstrated by these districts and to allow such districts to qualify for assistance under the Act, it is proposed to amend the regulations to permit districts which are unable to alter the faculty assignment patterns within the existing time constraints a longer period in which to complete corrective action.
>
> The proposed revision of the regulations is to amend the provision for waiver of ineligibility resulting from discrimination in faculty assignment to permit districts to show that policies of teacher assignment which resulted in ineligibility have been changed and that corrective action to eliminate the results of past discrimination in assignment is being taken through implementation of a plan which will accomplish the complete elimination of such discrimination within a prescribed time frame.

38 Fed. Reg. 18899. Responding to criticism that the modified regulation conflicted with the statutory standards, the Secretary cogently argued that section 1605(d)(1) did not require as a condition for granting a waiver the elimination of all effects of past discriminatory practices. He pointed out that the elimination of the active practice

and the adoption of a plan to eliminate the effects satisfied the statutory standard:

> Two commenters felt that section 706(d)(3) of the Act requires all racially identifiable faculty assignments to be eliminated before a waiver application can be approved. It should be understood that § 185.43(b)(2) permits a finding of ineligibility based upon "discrimination in assignment" (section 706(d)(1)(B) of the Act) where the assignment of full-time classroom teachers has been made in such a manner as to identify a school as intended for students of a particular race, color, or national origin, and that section 706(d)(3) requires that the practice, policy, procedure, or other activity which resulted in ineligibility must cease to exist before a waiver can be granted. The Act does not require that racially identifiable faculties be completely eliminated prior to granting a waiver. Section 185.44(d)(3)(i) and (ii) require that an applicant for waiver adopt a policy of nondiscriminatory assignments, and that no new assignments of staff be made which contribute to or reinforce identifiability of schools. These requirements satisfy the relevant provision of section 706(d)(3).

38 Fed. Reg. 21646.

The present language of the regulation—conflicting with the Secretary's interpretation—was adopted by HEW only after the Court of Appeals for the District of Columbia, in *Kelsey* v. *Weinberger*, 489 F.2d 701 (D.C. Cir. 1974), held the then existing regulation invalid. As HEW explained in the subsequent notice of proposed rulemaking, *Kelsey* read section 1605(d)(1) to condition the granting of a waiver upon the elimination of the effects of past discriminatory practices:

> Section 185.44(d)(3) contains requirements for waivers of ineligibility resulting from the discriminatory assignment of teachers, as prohibited by § 185.43(c)(2). The regulation is revised pursuant to the May 14, 1974, decision of the United States Court of Appeals for the District of Columbia in *Kelsey* v. *Weinberger*, and substantially restores the require-

> ments for waiver in effect prior to the summer of 1973. Thus, an applicant for a waiver of ineligibility based on discriminatory faculty assignment must reassign faculty members to eliminate the effects of the discriminatory practice before the waiver may be approved.

40 Fed. Reg. 14167 (1975), adopted June 21, 1975, 50 Fed. Reg. 25176.

For reasons indicated below, we do not consider *Kelsey* dispositive of the issue before us. The critical observation at this point, however, is that HEW, the agency charged with administering ESAA, considered that the purposes of the Act could best be promoted by granting waivers to school districts that had eliminated discriminatory practices but had not yet eliminated all their effects. Such agency interpretations are generally entitled to great deference. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *United States* v. *City of Chicago*, 400 U.S. 8, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970); *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961).

D. Decisions by Other Courts

HEW argues that *Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C. Cir. 1974), controls the issue before us. We disagree. *Kelsey* involved a challenge to the version of regulation 45 C.F.R. § 185.44(d)(3), adopted on August 16, 1973, 38 Fed. Reg. 21646, which permitted waivers to be granted after discriminatory teacher assignment practices had been curtailed but before teachers had been reassigned to rectify the effects of the past practice. Prior to the promulgation of the regulation, HEW had declared ineligible the school districts of Los Angeles, Baltimore, Detroit, Richmond (California) and Rochester (New York); each had had discriminatory teacher assignment practices violating 20 U.S.C. § 1605(d)(1)(B) (Supp. II 1972). *See Kelsey* v. *Weinberger*, 363 F.Supp. 521, 521-22 (D.C. 1973), *reversed*, 498 F.2d 701 (D.C. Cir. 1974). When waivers were granted after the adoption of the new

regulation, school children in the cities brought suit, through their parents, seeking to declare the new regulation invalid and to enjoin its operation. At the time the waivers were granted, the school districts had proposed plans to end the discriminatory teacher assignment practices gradually by assignment of new teachers without respect to race; the effects of past discrimination would not have been eliminated for many years. *See Kelsey* v. *Weinberger*, 498 F.2d 701, 706 (D.C. Cir. 1975). The Court of Appeals for the District of Columbia held that the statutory standard for granting waivers, 20 U.S.C. § 1605(d)(1), required the elimination of the effects of discriminatory practices prior to the issuance of a waiver. 498 F.2d at 711. It ruled that waivers should have been denied to the school districts involved and invalidated the newly promulgated regulation as contrary to the statutory standard. 498 F.2d at 711.

This court is not bound by the decisions of the Court of Appeals of the District of Columbia. *See, e.g., Pan American World Airways, Inc.* v. *C.A.B.*, 517 F.2d 734, 741 (2d Cir. 1975); *Akinin* v. *Phillips*, 424 F.Supp. 104 (S.D.N.Y. 1976). Even if decisions of that circuit were binding, the narrow factual question presented in *Kelsey* distinguishes that case from the one here. The Board of Education of New York City has agreed to a plan requiring elimination by 1980 of the effects of discriminatory assignments of teachers. In *Kelsey*, as the Court of Appeals emphasized, the school districts had agreed only to a plan requiring reassignment through the gradual process of filling vacancies created by attrition:

> [N]one of the cities offers to undertake any involuntary redistribution of teachers presently assigned on a racial basis. Rather, they propose to rely on the gradual though inevitable process of teacher attrition to create vacancies, and upon nondiscriminatory appointment and assignment of new teachers as a means of reducing prohibited racial concentrations within the two-year time frame of the regulation. In short, instead of altering faculty setups ensuing from racially induced faculty assignments in the past, the

> cities will continue those assignments in effect, subject to change only by the filling of vacancies on a nonracial basis.

498 F.2d at 706.

The plan adopted by the Board and approved by HEW arguably is designed to forthrightly correct the effects of past discriminatory practices. The plan adopted by the school districts in *Kelsey* was arguably totally inappropriate to a good faith desire to promptly eliminate the practice or effects of discrimination. Thus limited to its facts, *Kelsey* holds only that a plan to remedy the effects of past discriminatory teacher assignment practices by relying upon a nondiscriminatory policy for new teachers and vacancies does not satisfy the statutory requirements for a waiver.

Even if *Kelsey* were not distinguishable upon its facts, we would decline to adopt its statutory analysis. The Court considered its reading of ESAA compelled by constitutional principles; any interpretation of § 1605(d)(1) that allowed federal funding to a school system that had not eradicated the effects of past discrimination, the Court reasoned, might violate equal protection principles:

> Appellees' reading of the Act's waiver provision as a license to fund school districts in which the evils of discriminatory teacher assignments remain uneradicated generates concern of constitutional proportions.
>
> We think that construction unwarrantedly exposes the Act to a severe risk of "danger of unconstitutionality," and for that reason must be shunned.

498 F.2d at 708 (footnote omitted).

The Court's constitutional analysis offered two strands of argument; neither is compelling. The first emphasized the importance of enforcing the Supreme Court's mandate "to terminate dual school systems at once." *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). *See Bradley* v. *School Bd.*, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965); *Griffin* v. *County School Bd.*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Watson* v. *City of Memphis*, 373 U.S.

526, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963); *Brown* v. *Board of Educ.*, 349 U.S. 294, 75 S.Ct. 693, 98 L.Ed. 884 (1954); *Brown* v. *Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

To the extent that the Court of Appeals feared that the Supreme Court's mandate for immediate desegregation would be undercut by federal funding of school systems failing to fully desegregate, the analysis retains some vitality. Withholding funds from school districts that have failed to fully eliminate the effects of past discrimination arguably would stimulate the implementation of desegregation plans. Nonetheless, distributing funds to help further desegregation would also satisfy the Supreme Court's mandate. Congress' broad power to enforce the fourteenth amendment, *see generally* Tribe, American Constitutional Law § 5–14 (1978), allows the allocation of funds to promote good faith efforts to desegregate. Considering the often almost intractible problems encountered in any effort to change such deeply rooted social patterns, Congress may have provided the most effective way to satisfy the Supreme Court's desegregation mandate; funding good faith efforts to desegregate may, Congress could rationally determine, be more productive than denying funds to school districts failing to eliminate immediately all traces of past discrimination.

The second argument in *Kelsey* emphasized the Fifth Amendment's prohibition of federal support of discriminatory practices.

> Additionally, and very plainly, the Secretary's revised regulation opens the door to federal financial contributions in situations wherein local educational agencies have defaulted in the discharge of their faculty desegregation responsibilities. It cannot be gainsaid that "[a] State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also to giving significant aid to institutions that practice racial or other invidious discrimination." . . . Certainly the Fifth Amendment does not tolerate the Federal Government in an involvement with racially segre-

> gated education which the Fourteenth prohibits to the states. On the contrary, this court *en banc* has already recognized and enforced the Secretary's "general obligation not to allow federal funds to be supportive of illegal discrimination."

498 F.2d at 709–10 (footnotes omitted). This argument is far less persuasive when applied to the facts presented here than to those in *Kelsey*. Characterizing a waiver applicant as having "defaulted" in its desegregation responsibilities distorts the issue; the suggestion is that the applicant continues to discriminate. Congress expressly recognized, in passing the Act, that delay in complete desegregation may be attributable to lack of skills and resources as well as to default of constitutional obligations. To be sure, the Board now needs a waiver because its past teacher assignment practices violated the safeguards established by the Act to prevent the distribution of funds to school systems continuing to discriminate. Yet, under the application procedures of the Act, the threshold eligibility requirement of a qualified desegregation "plan" guards against the financing of such "less scrupulous" applicants. *Northeast Community Organization, Inc.* v. *Weinberger*, 378 F.Supp. 1287, 1294 (D. Maryland 1974). Why should not an HEW approved plan, like the Memorandum agreed to by the Board, be considered to also provide sufficient protection against the continuation of the discriminatory practices that resulted in ineligibility and the need for a waiver?

The decisions cited in *Kelsey* stand only for the proposition that state or federal funding may not be used to support an ongoing discriminatory practice. *See Norwood* v. *Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973); *Griffin* v. *County School Bd.*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Cooper* v. *Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). The provisions of the plans at issue in *Kelsey* raised the danger that a good faith effort to eliminate discriminatory practices and their effects was being avoided. Thus constitutional barriers to federal financial support arguably existed. Since the plan agreed to by the Board of Education of New York

City does, HEW might find, represent such a good faith effort to eliminate the effects of discrimination after discrimination has ceased, the constitutional doubts suggested by *Kelsey* are not relevant.

HEW cites a second decision, *Board of Ed., Cincinnati*, v. *HEW*, 396 F.Supp. 203, 231 (S.D. Ohio 1975), *rev'd in part*, 532 F.2d 1072 (6th Cir. 1976), in support of its interpretation of the requirements for a waiver of ineligibility. This reliance is also misplaced. There, the plaintiff school board had apparently not raised the issue of entitlement to a waiver of ineligibility. The court's discussion of the waiver requirements was thus extraneous to the issues before it.

IV. CONCLUSION

HEW may, but need not, grant a waiver where a plan like the New York 1977 Memorandum of Understanding has been adopted terminating all active discrimination and beginning prompt elimination of the results of past discrimination, but where the effects of past discriminatory teacher assignment have not been fully eliminated. To the extent that the regulations promulgated under the Emergency School Aid Act conflict with this interpretation of the statute, they are invalid.

Continued existence of the effects of past discriminatory teacher assignments is one factor HEW may consider in determining whether such past practices or policies have truly ceased to exist. The statutory provisions do not preclude HEW from determining that the Board is proceeding to eradicate the effects of that past discrimination in good faith and with expedition at a rate and using methods approved by HEW, and from considering such factors in deciding on the issue of waiver. Obviously the decision on waiver implies the exercise of discretion and judgment by HEW. The application for a 1978–79 waiver is remanded to HEW for further consideration.

To prevent the loss of 1978–79 ESAA funds before the validity of the original determination of ineligibility is resolved in 1977–78 ESAA funds litigation now pending in

the Supreme Court, the court grants the Board's request for an injunction mandating that HEW preserve and set aside the 1978–79 ESAA funds which the Board would have received were it not for the determination of ineligibility and denial of the application for a waiver. This portion of the injunction shall be valid pending a final judicial determination of the validity of HEW's denial of the Board's 1977–78 and 1978–79 ESAA applications.

So ordered.

Dated: Brooklyn, New York
January 10, 1979

U.S.D.J.

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No. 80-624

DEC 28

MICHAEL RODAK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHIRLEY M. HUFSTEDLER, Secretary of the Department of Education, et al.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Court of Appeals for the Second Circuit was correct in holding that a school district is entitled to a waiver of ineligibility under the

Emergency School Aid Act of 1972, where the "practice policy or procedure" which resulted in the ineligibiity determination "has ceased to exist or occur," and the school district is in the process of implementing a phased plan to eradicate the effects of such policies.

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STATEMENT

This is the second case to reach this Court concerning the dispute between the New York City Board of Education ("the Board") and the United States Department of Health, Education and Welfare ("HEW") over the Board's entitlement to funding under the Emergency School Aid Act of 1972 ("ESAA"), 20 U.S.C. §§1601 et seq.[1/] In the first case, Board of Education of the City School District of the City of New York v. Harris, 444 U.S. 130 (1979), this Court resolved the question of the

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1/ ESAA was simultaneously repealed and reenacted effective September 30, 1979, pursuant to the Education Amendments of 1978. Pub. L. No. 95-561, 92 Stat. 2268 (sec. 601 (b)(2)). It was recodified at 20 U.S.C. §§3191 et seq. and remains identical in pertinent part to the former version which governs this case.

Responsibility for the administration of ESAA has been transfered from HEW to the new Department of Education. See, Pet. at 2, n.2.

proper test for determining when an ESAA applicant should be found ineligible for funding due to alleged discriminatory staff assignment policies. 20 U.S.C. §1605(d)(1)(B). It was held that a rebuttable disparate impact test is applicable to this particular ground of ineligibility and that under this test the Board was ineligible for 1977-1978 ESSA funding.

Harris did not consider the distinct question of a school district's entitlement to a waiver of ineligibility as an alternative means of funding where it had been found ineligible for a grant in the first instance. Under Section 1605(d)(1) of ESAA, where an applicant has been found ineligible for funding it may yet obtain a grant by means of a waiver of ineligibility. Waivers are available where the applicant provides assurances that:

> ...[A]ny practice, policy or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission.

20 U.S.C. §1605(d)(1).

The issue on which petitioners seek review by this Court is whether the court of appeals correctly construed this provision.

On June 20, 1978, the Secretary of HEW informed the Board that it was ineligible for a 1978-1979 ESAA grant because of the same allegedly discriminatory staff assignment practices which had resulted in the ineligibility finding for 1977-1978 funds. At issue for 1978-1979 was $2.36 million. On July 7, 1978, the Board applied for a waiver of ineligibility for 1978-1979 ESAA funding. The application was denied on September 26, 1978, on the grounds, inter alia, that the 1977 Memorandum of Understanding

("MOU") between the Board and the HEW Office of Civil Rights was a phased remedial plan and would not eradicate the disparity in teacher assignments by the opening of the 1978-1979 school year.[2/] See, Pet. App. at 31a, n.5.

Shortly thereafter, the Board initiated this action challenging the finding of ineligibility and the denial of its application for a waiver of ineligibility. The district court upheld the ineligibility finding but entered an injunction remanding the Board's waiver application for de novo reconsideration. The court held that where a waiver applicant has entered into a

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2/ A petition for a writ of certiorari has been filed with this Court in Caulfield v. The Board of Education, No. ____ (filed December 15, 1980), Docket No. 79-6191 (2d Cir. Sept. 22, 1980), aff'g 486 F. Supp. 862 (E.D.N.Y. 1979). Caulfield presents a challenge to the validity of the MOU. See, Pet. at 5, n.4.

remedial plan with HEW and all "active discriminat[ion]" has been terminated (Pet. App. at 56a), and the effects of prior discriminatory policies will be eliminated over the course of the plan's implementation, a waiver of ineligibility may be available. The court granted the Board's motion for summary judgment remanding its waiver application to the agency for a determination of whether the MOU was being properly implemented. In the process, the court voided 45 C.F.R. §185.44(d)(3) of the ESAA regulations, to the extent that it conflicted with the court's opinion.

The court of appeals affirmed with Judge Oakes dissenting. The majority held, per Judge Meskill, that once a waiver applicant had "adopted a policy of eliminating discrimination in a manner approved by HEW" a waiver should not be withheld simply because the

applicant "must tolerate segregative teacher assignments until the plan is fully implemented...." Pet. App. at 17a.

Shortly after the decision below was rendered, this Court's opinion in Harris was handed down. Petitioners filed a petition for rehearing with a suggestion for a rehearing en banc on the basis that, inter alia, the court of appeals' decision was inconsistent with Harris. The petition was denied with Judge Oakes adhereing to his previous view. Judge Meskill held on rehearing that the issue before this Court in Harris -- intent vs. impact as the test for determining ineligibility -- was not controlling on the separate question of the availability of waiver of ineligibility, and that the decision

below was fully compatible with Harris.[3/]

REASONS FOR NOT GRANTING THE PETITION

In seeking review of the Second Circuit's decision in this matter, petitioners rely on essentially four grounds: (1) the decision below is inconsistent with ESAA's legislative history -- most notably the history surrounding ESAA's predecessor, the Emergency School Assistance Program ("ESAP"), Pub L. No. 91-380, 84 Stat. 800, 803-804; (2) the decision below is inconsistent with this Court's decision in Harris; (3) the decision below is inconsistent with the legislative history surrounding the 1978 reenactment of ESAA; and (4) the decision below and

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3/ Pursuant to the decisions below, the $2.36 million fund earmarked for the Board's 1978-1979 ESAA application remains intact pending final judicial or administrative review.

that of the District of Columbia Court of Appeals in Kelsey v. Weinberger, 498 F. 2d 701 (D.C. Cir. 1974), present a "conflict in principle" requiring resolution by this Court.

Respondents submit that none of these issues warrant review by this Court.

1. ESAP. Congress' troubled experience with ESAP, ESAA's predecessor, does nothing to support petitioners' argument that waivers of ineligibility are unavailable until the effects of past discriminatory practices have been eradicated.

In enacting ESAA, Congress' objection to ESAP focused on HEW's failure to prevent ESAP funds from going to school districts that were still actively discriminating. This is precisely the point of the report entitled The Emergency School Assistance

Program: An Evaluation (November, 1970) pp. 2-3, cited at p. 10, n. 7 of the petition. The report criticized ESAP funding of districts "engaging in serious and widespread discrimination." (Emphasis added.) See also, 117 Cong. Rec. 10758 (1971) (remarks of Sen. Mondale); S. Rep. No. 92-61 at 28 (1971) (criticising ESAP funding of agencies "practicing" illegal discrimination). Thus, the problems experienced with ESAP were not to be remedied in ESAA by requiring HEW to refuse to grant waivers of ineligibility where the effects of past discriminatory policies had yet to be eradicated. Rather, it was funding of school districts with ongoing discriminatory policies that Congress wished to prohibit in ESAA. See, Pet. App. 18a-19a. The court of appeals' construction of the waiver provision is in harmony with this legislative intent in that a

sucessful waiver applicant must have "ceased" any discriminatory policies as well as be in the process of eradicating the effects of those policies.[4/]

2. Board of Education v. Harris. The decision below is not inconsistent with this Court's decision in Board of Education v. Harris, supra.

4/ Petitioners additionally argue that the court of appeals misinterpreted ESAA's purpose as "assist[ing] local officials in shouldering the costs of the physical process of desegregation." Pet. at 12. While we agree with petitioners that ESAA's purpose is not to fund basic desegregation activities, but rather to assist in meeting "the special needs incident to" eliminating segregation (20 U.S.C. §1601(b)), we disagree that there is anything in the decision below to indicate that it was based on a faulty understanding of ESAA's purpose. The court of appeals recognized ESAA's statutory purpose and quoted it in full (Pet. App. at 4a), and subsequently concluded that ESAA does not require the elimination of "the residue of past misconduct" in order for a waiver to be granted. Pet. App. at 16a. Petitioners' claim that this result was premised on a misinterpretation of the legislative purpose is wholly unsubstantiated.

On the contrary, taken together, these decisions constitute an effective means of implementing Congress' overall intent in enacting ESAA.

In Harris, the Court held that Congress intended that applicants accused of engaging in a statutorily proscribed practice must meet a weighty burden in rebutting the accusation or else be found ineligible for a grant. That determination, when taken with petitioners' view of the waiver of ineligibility provision, would have an anomalous result. De jure segregated school districts which had been subjected to court ordered phased desegregation plans prior to ESAA's effective date, could receive ESAA grants, whereas ESAA funds would be unavailable to school districts experiencing de facto segregation, such as New York City's, while they are in the process of

voluntarily desegregating and eradicating the effects of any disqualifying condition which occurred after ESAA's effective date. [5/] Although under petitioners' reasoning a waiver could become available after the effects of the disqualifying practices are completely eradicated, the fact remains that during the intervening period -- possibly years -- no ESAA money would be available. Surely this could not have been Congress' intent, since it is obvious that the most critical need for ESAA funded programs occurs during the most intensive period of the desegregation process. Moreover, one of Congress' principal aims in enacting ESAA was to encourage voluntary desegregation efforts in de facto segregated

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5/ Both the court of appeals and the district court correctly rejected this construction of ESAA. See, Pet. App. at 20a and 55a.

districts by providing necessary financial assistance to ameliorate some of the disruptive effects of the desegregation process:

> Racial isolation of students exists throughout the country. The Committee has found a willingness on the part of many school districts to seek the elimination of this isolation through voluntary integration programs or under the court decrees. Most school districts, however, are hard pressed to meet ordinary expenses. They are in no position to incur the added expense of achieving successful integration. The committee believes that the Federal Government is under an obligation to assist these districts in their integration efforts. It is time for the rhetoric of the Federal Government to be backed up by sufficient funds to assist them in striving for this goal.
>
> * * *
>
> *** The schools are being made to bear a large part of the burden of integrating our society. The eventual attainment of that goal is seriously jeopardized so long as we deny them funds adequate to perform the task.

H. Rep. No. 92-576 at 4 (1971). See also, 20 U.S.C. §1601(b)(2); Pet. App. at 4a-6a; 52a-54a.

Thus, it is only by construing the waiver of ineligibility provision as did the court below, that Congress' overall purpose in enacting ESAA can be effectuated. Harris holds that eligibility for ESAA funding is quite restrictive, while the decision below makes clear that funding is nonetheless available where an applicant found to be ineligible agrees to immediately abandon the disqualifying practices and to eradicate existing racial disparities pursuant to a plan approved by the federal agency. In this way ESAA continues to be meaningful in providing a financial inducement for voluntary desegregation, while ensuring

that ineligible school districts are desegregating in good faith.[6/] See, Pet. App. at 20a-21a.

In asserting that the decision below conflicts with Harris, petitioners clearly overstate Harris' holding. Petitioners claim that Harris "held" that the "existence of racially identifiable faculties should preclude assistance" under ESAA and that "the existence of segregation is the dispositive factor under ESAA...." Pet. at 13. Yet Harris' language on the "existence" of segregation was strictly limited to the question of ineligibility; this Court never reached the separate question of under what circumstances ESAA assistance is available to an ineligible applicant through a waiver of ineligibility.

6/ Where an ESAA recipient fails to comply with the terms of its grant or the statute or regulations, funding will be terminated and funds not spent at the time of termination must be returned to the Government. 45 C.F.R. §185.45.

Further, petitioners engage in semantics in first quoting Harris' language that ESAA grants should not go to an applicant "maintaining a de facto segregated system" (Pet. at 13, quoting 444 U.S. at 142, emphasis in original), and then stating that "it would be exceedingly formalistic" to grant a waiver of ineligibility "during the continued maintenance of such segregation." Pet. at 13. The court of appeals in this case never held that a waiver of ineligibility is available where an applicant is "maintaining" a segregated system. Rather, the court held that where discriminatory practices had been eliminated, a waiver may be granted although the applicant "must tolerate segregative teacher assignments until the [remedial] plan is fully implemented ...." Pet. App. at 17a. "Maintaining" a segregated system is a far cry from experiencing lingering -- but diminishing

-- racial disparites while a federally approved desegregation plan is being implemented.

Petitioners are no less semantical when they argue that a disqualifying practice or policy can not cease to exist or occur until the effects of the practice or policy -- racially identifiable faculty assignments -- have been fully eradicated. Pet. at 13. As stated by the district court:

> Accepting HEW's suggestion that eliminating causes also requires elimination of all effects would blur distinctions between the concepts of cause and effect. To argue that the effects of past discrimination alone constitutes a present policy of discrimination makes little sense in the context of this case where the applicant Board has committed itself, in the Memorandum of Understanding, to a program of eliminating those effects.

Pet. App. at 51a. See also, Pet. App. at 17a.

3. The 1978 Reenactment of ESAA. Petitioners further seek review of the decision below on the ground that it conflicts with Congress' intent as manifested in the 1978 reenactment of ESAA. The Education Amendment Act of 1978, Pub. Law No. 95-561, Title VI, 92 Stat. 2252 et seq. Petitioners rely on H. Rep. No. 95-1137 at 95-96 (1978) wherein an amendment is discussed which would have the effect of explicitly overruling petitioners' construction of ESAA's waiver of ineligibility provision. Pet. at 14. The amendment was deleted by the Conference Committee without explanation. H.R. Conf. Rep. No. 95-1753 (1978).

H. Rep. No. 95-1137 does not suggest that the proposed waiver of ineligibility amendment was at odds with Congress' original intent in enacting ESAA. Rather, the Report states that

the amendment was adopted for the purpose of "making clear" to HEW that waivers are available where faculty integration efforts are still underway. Id. at 95. Thus, the proposed amendment may be viewed as clarification of the existing law rather than an unsuccessful attempt to depart from Congress' original intent.

Although it is unclear why the House's proposed amendment was not adopted, it is clear that in reenacting ESAA in 1978, the Senate shared the House's concern that ESAA funds should not be withheld from school districts engaged in the process of desegregation:

> The amendment [of the Senate Committee On Human Resources] attempts to further increase the focus on school districts in the initial stages of desegregation, making the program more accurately reflect the original congressional intent that there is a Federal responsibility to assist school districts facing emergency situations resulting from desegregation.

S. Rep. No. 95-856 at 65 (1978). Accordingly, the court of appeals' decision is not inconsistent with the 1978 reenactment ESAA.[7/]

3. Kelsey v. Weinberger. Although there is a facial conflict between the decision below and the decision in Kelsey v. Weinberger, 498 F. 2d 701 (D.C. Cir. 1974), we disagree with petitioners that this Court's review is necessary to resolve the matter.

7/ In Harris the Court commented on the rejection of this amendment in support of its conclusion that the ESAA regulations correctly predicated ineligibility on disparate impact. Id., 444 U.S. at 148. On the basis of this comment, petitioners argue that the court of appeals decision is in conflict with Harris. Petitioners' argument was considered by the court of appeals on the petition for rehearing. Pet. App. at 40a, 42a. The court concluded that this Court's reference in Harris to the unsuccessful House amendment was not addressed to the issue of waivers of ineligibility and, moreover, that its holding was consistent with Harris' construction of ESAA's objectives. Pet. App. at 42a.

Kelsey contained the broad holding that a waiver of ineligibility may be granted only where the effects of past discriminatory practices, as well as the practices themselves, had "ceased to exist." Id. at 711. Kelsey voided HEW's newly proposed regulation (38 Fed. Reg. 21646) which, ironically, was consistent with the construction of ESAA's waiver provision adopted by the courts below, and now challenged by petitioners. See, Pet. App. at 26a and n. 12; 57a-61a.

Despite Kelsey's holding, however, its facts reveal that the ESAA applicants there lacked affirmative plans approved by HEW to eliminate segregative teacher assignments. In fact, the school districts were content to resolve the "racially induced faculty assignments" simply through attrition. Id. at 706. It is thus apparent that

petitioners have overreacted to Kelsey's holding. Limited to its facts, Kelsey does nothing more than proscribe the issuance of a waiver of ineligibility where an applicant lacks a federally approved plan and does nothing more to remedy discriminatory teacher assignment policies and their effects than to rely on a future nondiscriminatory policy for filling vacancies resulting from attrition.

Viewed in this proper light, Kelsey is completely compatible with the decision below (see, Pet. App. at 23a, n. 11; 61a-66a) and review by this Court is unnecessary. Petitioners should administer ESAA so that, in accord with Kelsey, waiver of ineligibility applications are denied where school districts lack federally approved desegregation plans which will "forth-

rightly correct the effects of past discriminatory practices" (Pet. App. at 63a), while, in accord with the decision below, waivers should be granted where policies having a disparate impact have been eliminated and a federally approved plan to eradicate the condition resulting in ineligibility is being implemented in good faith.

CONCLUSION

Based on the foregoing, the question presented is inappropriate for review and the petition for a writ of certiorari should be denied.

New York, New York

December 22, 1980

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